TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 128

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, AND CLAY TALLMAN, COMMISSIONER OF THE GENERAL LAND OFFICE, APPELLANTS,

vs.

THE STATE OF NEW MEXICO.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JUNE 11, 1919.

(27167)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 412.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, AND CLAY TALLMAN, COMMISSIONER OF THE GENERAL LAND OFFICE, APPELLANTS,

vs.

THE STATE OF NEW MEXICO.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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1 Court of Appeals of the District of Columbia.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, et al., appellants,
vs.
STATE OF NEW MEXICO. } No. 3221.

Supreme Court of the District of Columbia.

STATE OF NEW MEXICO, PLAINTIFF,
vs.
FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, and Clay Tallman, Commissioner of General Land Office, defendants. | Equity. No. 35624.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

Bill.

Filed December 21, 1917.

In the Supreme Court of the District of Columbia.

STATE OF NEW MEXICO, PLAINTIFF,
vs.
FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, and Clay Tallman, Commissioner of the General Land Office, defendants. | Equity. No. 35624.

To the Supreme Court of the District of Columbia, holding an Equity Court:

The State of New Mexico, plaintiff, by its attorney general, Harry L. Patton, and its assistant attorney general, Milton J.
2 Helmick, brings this its bill of complaint, on its own behalf, against Franklin K. Lane, a citizen of the State of California, residing in the District of Columbia, and Clay Tallman, a citizen of the State of Nevada, and residing in the District aforesaid, in respect of the matters and things hereinafter set forth. The State says:

I. That the State of New Mexico is one of the States of the American Union and is a sovereign State of the United States. That at the time of the filing of this bill the defendant, Franklin K. Lane, was, and he still is, the Secretary of the Interior Department of the United States, and, as such, has charge of the administration of the

laws of the United States relating to the public lands, and the administration of all land grants made by Congress including any portion of said public lands; and that the defendant, Clay Tallman, was, and he still is, Commissioner of the General Land Office of the United States, the latter being one of the branches of said Department of the Interior, having immediate charge of the matter of the administration of the public lands of the United States, and of land grants made by Congress, said Commissioner acting therein under the direction, supervision and approval of the Secretary of the Interior; and that each said defendant is sued in his official capacity as such Secretary of the Interior and Commissioner of the General Land Office, respectively, as hereinafter set forth.

II. That, by act of Congress, approved June 21, 1898 (30 Stat. 484, 5), entitled "An act to make certain grants of land to the Territory of New Mexico, and for other purposes," a grant of land was made to the Territory of New Mexico, said grant being thus:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That sections numbered sixteen and thirty-six in every township of the Territory of New Mexico, and where such sections, or any parts thereof, are mineral or have been sold or otherwise disposed of by or under the authority of any act of Congress, other nonmineral lands equivalent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said Territory for the support of common schools, such indemnity lands to be selected within said Territory in such manner as is hereinafter provided:

"Provided, That the sixteenth and thirty-sixth sections embraced in permanent reservations for national purposes shall not at any time be subject to the grants of this act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants of this act; but such reservations shall be subject to the indemnity provisions of this act."

And by sections seven, eight, and nine of said act it was thus provided:

"Sec. 7. That this act is intended only as a partial grant of the lands to which said Territory may be entitled upon its admission into the Union as a State, reserving the question as to the total amount of lands to be granted to said Territory until the admission of said Territory as a State shall be determined by Congress.

"Sec. 8. That all grants of land made in quantity or as indemnity by this act shall be selected by the governor of the Territory of New Mexico, the surveyor general of the Territory of New Mexico, and the solicitor general of said Territory, acting as a commission, under the direction of the secretary of the interior, from the unappropriated public lands of the United States within the limits of the said Territory of New Mexico.

"Sec. 9. That said commission shall proceed upon the passage of this act, to select said lands, for each purpose as hereinbefore designated, in legal subdivisions, of not less than one-quarter section, and shall report to the secretary of the interior such selections, designating in such report the purpose for which such bodies of land as selected are to be respectively used as provided above in this act."

III. That said Territory of New Mexico duly accepted the grant so made to it in said act and evidenced its acceptance thereof by an enactment of its legislative assembly, approved March 16, 1899, (Laws of New Mexico, 1899, at page 156 et seq.) entitled "An act establishing a board of public lands, asigning their duties, and for leasing and managing public lands and funds," certain of the provisions of said enactment being as follows:

"Section 1. That the governor, solicitor general and commissioner of public lands shall be and hereby are constituted a board of public lands for the leasing, sale and general management and control of all public lands or public funds that have been granted or shall hereafter be granted for any purpose to the Territory of New Mexico, or to the State when it shall become a State and for the investment of any public funds as the best interests of the Territory, or State when it shall become a State shall require, not inconsistent with the provisions of the acts of the Congress of the United States (or) this act."

* * * * * * *

"Section 10. All lands granted to the Territory by Congress or that shall hereafter be granted to the Territory of New Mexico or the State of New Mexico by an act of Congress, appcoved June 21, 1898, entitled 'An act to make certain grants of land to the Territory of New Mexico and for other purposes,' or by any other act which may hereafter be passed by Congress for any of the purposes or similar purposes as those mentioned in the act of Congress before referred to, are hereby withdrawn from market, and the sale thereof, is hereby prohibited except as hereinafter provided."

* * * * * * *

"Section 28. All funds belonging to the Territory for any of the purposes for which the donations were made by the said act of
4 Congress herein referred to or any similar act of Congress which may hereafter be enacted for the benefit of the Territory or the State of New Mexico, shall be deemed trust funds and held by the Territory, the interest and income whereof are only to be used except as hereinafter provided and the Territory shall supply all loss of said funds that may occur, so that the same shall remain entire and undiminished," et cet.

* * * * * * *

"Section 31. The said board hereby created is hereby authorized and empowered in order to immediately raise the necessary funds to secure the lands already donated to the Territory by the act of Congress herein mentioned, it being impossible for the Territory to immediately provide the same owing to its financial condition, to contract for a sale and to sell and dispose of a sufficient quantity of any of the lands authorized by the said act of Congress before men-

tioned to be sold and disposed of, for the best price obtainable and for a sum not less than three dollars per acre, sufficient to realize the amount of eighteen thousand dollars, out of which amount when so realized the fees of the offices of the various land offices where any of the lands so donated by said act of Congress may be situate, shall be paid," et cet.

IV. That, by act of Congress, approved March 16, 1908, (35 Stat. 44) entitled "An act to make the provisions of an act of Congress approved February twenty-eighth, eighteen hundred and ninety-one (Twenty-sixth Statutes, page seven hundred and ninety-six), applicable to the Territory of New Mexico," it was provided:

"That all the provisions of an act of Congress approved February twenty-eighth, eighteen hundred and ninety-one, entitled 'An act to amend sections twenty-two hundred and seventy-five and twenty-two hundred and seventy-six of the Revised Statutes of the United States providing for the selection of lands for educational purposes in lieu of those appropriated for other purposes,' be, and the same are hereby, made applicable to the Territory of New Mexico, and the grant of school lands to said Territory, and indemnity therefor, shall be administered and adjusted in accordance with the provisions of said act, anything in the act of Congress approved June twenty-first, eighteen hundred and ninety-eight, making certain grants of land to the Territory of New Mexico, and for other purposes, to the contrary notwithstanding."

That said sections 2275 and 2276 of the Revised Statutes of the United States, as amended by the act of February 28, 1891, supra, read as follows:

"Sec. 2275. Where settlements with a view to pre-emption or homestead have been, or shall hereafter be made, before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the claims of such settlers; and if such sections, or either of them, have been or shall be granted, reserved, or pledged for the use of schools or colleges in the State or Territory in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected by said State or Territory, in lieu of such as may be thus taken by preemption of homestead settlers. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory where sections sixteen or thirty-six are mineral land, or are included within any Indian, military, or other reservation or are otherwise disposed of by the United States: Provided, Where any State is entitled to said sections sixteen and thirty-six, or where said sections are reserved to any Territory, notwithstanding the same may be mineral land or embraced within a military, Indian, or other reservation, the selection of such lands in lieu thereof by said State or Territory shall be a waiver of its right to said sections. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever. And it shall be the duty of the secretary of the interior, without awaiting the extension of the public surveys,

to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservations, and thereupon the State or Territory shall be entitled to select indemnity lands to the extent of two sections for each of said townships, in lieu of sections sixteen and thirty-six therein; but such selections may not be made within the boundaries of said reservations: Provided, however, That nothing herein contained shall prevent any State or Territory from awaiting the extinguishment of any such military, Indian, or other reservation and the restoration of the lands therein embraced to the public domain; and then taking the sections sixteen and thirty-six in place therein; but nothing in this proviso shall be construed as conferring any right not now existing."

Sec. 2276. "That the lands appropriated by the preceding section shall be selected from any unappropriated, surveyed public lands, not mineral in character, within the State or Territory where such losses or deficiencies of school sections occur; and where the selections are to compensate for deficiencies of school lands in fractional townships, such selections shall be made in accordance with the following principles of adjustment, to wit: For each township, or fractional township, containing a greater quantity of land than three-quarters of an entire township, one section; for a fractional township, containing a greater quantity of land than one-half, and not more than three-quarters of a township, three-quarters of a section; for a fractional township, containing a greater quantity of land than one-quarter, and not more than one-half of a township, one-half section; and for a fractional township containing a greater quantity of land than one entire section, and not more than one-quarter of a township one-quarter section of land: Pro-
6 vided, That the States or Territories which are, or shall be entitled to both the sixteenth and thirty-sixth sections in place, shall have the right to select double the amounts named, to compensate for deficiencies of school land in fractional townships."

V. That said Territory of New Mexico duly accepted the grant so made to it in the act of March 16, 1908, supra, and evidenced its acceptance thereof by an enactment of its Legislative Assembly, approved March 18, 1909 (Laws of New Mexico, 1909, at page 286 et seq.) entitled "An act to amend 'an act to provide for the leasing, sale, management and control of all lands now owned or hereafter acquired by the Territory of New Mexico; to create a territorial public land office; a commissioner thereof, and to prescribe the duties of such officer; to provide for the care, custody, disposition and investment of moneys derived from all territorial lands by leasing, sale or otherwise; and for other purposes, approved March 21, 1907,' and for other purposes," certain of the provisions of said enactment being as follows:

"Section 1. That section 3 of chapter 104 of the Session Laws of 1907 be and the same is hereby amended so as to read as follows:

"'Section 3. The commissioner of public lands shall be provided with an official seal, and it shall be his duty * * * to deed by

quitclaim or otherwise to the United States covering any or all claim that the Territory of New Mexico may have in and to lands within any private land grant or reservation made in pursuance of authority of any act of Congress, for the purpose of selecting indemnity lands therefor, or lands in lieu thereof.'"

VI. That by act of Congress approved June 20, 1910, (36 Stat. 557, 561, 562, 563, 565) entitled "An act to enable the people of New Mexico to form a constitution and State government and be admitted into the Union *or* an equal footing with the original States; and to enable the people of Arizona to form a constitution and State government and be admitted into the Union on an equal footing with the original States," a grant of land was made to the State of New Mexico, said grant being thus:

"Sec. 6. That in addition to sections sixteen and thirty-six, heretofore granted to the Territory of New Mexico, sections two and thirty-two in every township in said proposed State not otherwise appropriated at the date of the passage of this act are hereby granted to the said State for the support of common schools; and where sections two, sixteen, thirty-two, and thirty-six, or any parts thereof, are mineral, or have been sold, reserved, or otherwise appropriated or reserved by or under the authority of any act of Congress, or are waiting or fractional in quantity, or where settlement thereon with a view to preemption or homestead, or improvement thereof with a view to desert-land entry has been made heretofore or hereafter, and before the survey thereof in the field, the provisions of sections twenty-two hundred and seventy-five and twenty-two hundred and seventy-six of the Revised Statutes are hereby made applicable thereto and to the selection of lands in lieu thereof to the same ex-
7 tent as if sections two and thirty-two, as well as sections sixteen and thirty-six, were mentioned therein: * * * And provided further, That the grants of sections two, sixteen, thirty-two, and thirty-six to said State, within national forests now existing or proclaimed, shall not vest the title to said sections in said State until the part of said national forests embracing any of said sections is restored to the public domain; but said granted sections shall be administered as a part of said forests, and at the close of each fiscal year there shall be paid by the Secretary of the Treasury to the State, as income for its common-school fund, such proportion of the gross proceeds of all the national forests within said State as the area of lands hereby granted to said State for school purposes which are situate within said forest reserves, whether surveyed or unsurveyed, and for which no indemnity has been selected, may bear to the total area of all the national forests within said State, the area of said sections when unsurveyed to be determined by the Secretary of the Interior, by protraction or otherwise, the amount necessary for such payments being appropriated and made available annually from any money in the Treasury not otherwise appropriated."

* * * * * * *

"Sec. 10. That it is hereby declared that all lands hereby granted, including those which, having been heretofore granted to the said Territory, are hereby expressly transferred and confirmed to the said State, shall be by the said State held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same."

"Sec. 11. That all lands granted in quantity or as indemnity by this act shall be selected, under the direction and subject to the approval of the Secretary of the Interior, from the surveyed, unreserved, unappropriated, and non-mineral public lands of the United States within the limits of said State, by a commission composed of the governor, surveyor-general, or other officer exercising the functions of a surveyor-general, and the attorney-general of the said State."

VII. That said State of New Mexico duly accepted the grant so made to it by the act of Congress of June 20, 1910, supra, and evidenced its acceptance thereof by provisions in its State constitution which reads as follows:

"The permanent school fund of the State shall consist of the proceeds of sales of sections two, sixteen, thirty-two, and thirty-six in each township of the State, or the lands selected in lieu thereof," et cet. (Section 2 of Article XII of the constitution of the State of New Mexico.)

"All lands granted under the provisions of the act of Congress entitled 'An act to enable the people of New Mexico to form a constitution and State government and be admitted into the Union on
8 an equal footing with the original States' for the purposes of said several institutions are hereby accepted and confirmed to said institutions, and shall be exclusively used for the purposes for which they were granted," et cet. (Section 12 of Article XII of the constitution of the State of New Mexico.)

That acceptance by the State of New Mexico of the said grant is further evidenced by sections nine and ten of Article XXI of the constitution of the State of New Mexico (which article is entitled "Compact with the United States"), which sections provide:

Section 9. "This State and its people consent to all and singular the provisions of the said act of Congress, approved June twentieth, nineteen hundred and ten, concerning the lands by said act granted or confirmed to this State, the terms and conditions upon which said grants and confirmations were made and the means and manner of enforcing such terms and conditions, all in every respect and particular as in said act provided."

Section 10. "This ordinance is irrevocable without the consent of the United States and the people of this State, and no change or abrogation of this ordinance, in whole or in part, shall be made by any constitutional amendment without the consent of Congress."

VIII. That the final act obligating the United States to respect, observe, and abide all the terms and conditions of the grant made to the State of New Mexico by the said act of Congress of June 20, 1910, supra, and which had been accepted by said State as aforesaid, was performed by and under the proclamation of the President of the United States issued January 6, 1912 (37 Stat. 1723), in which proclamation it is recited that "the conditions imposed by the said act of Congress approved on the twentieth day of June, one thousand nine hundred and ten, and by the said joint resolution of Congress have been fully complied with" and proclaimed "that the fundamental conditions imposed by Congress on the State of New Mexico to entitle that State to admission have been ratified and accepted, and that the admission of the State into the Union on an equal footing with the other States is now complete."

That for the purpose of administering under, conserving, and enjoying the grant of land made to the State of New Mexico, as aforesaid, the legislature of the said State enacted a statute, approved June 14, 1912 (Laws of New Mexico, 1912, at page 174, et seq.), and entitled "An act to provide for the creation, organization, and maintenance of the State land office," et cet. That in said act it is provided, among other things, as follows:

"Section 1. That a State land office is hereby created, the executive officer of which shall be the commissioner of public lands," et cet.

"Section 2. * * * Said commissioner shall have power * * * to deed by quitclaim or otherwise to the United States any or all claims that the State may have in and to lands within any private land grant or reservation made or confirmed in
9 pursuance of authority of Congress, or to such of its lands as may be needed by the United States or for reclamation of power sites for the purpose of selecting indemnity lands therefor," et cet.

IX. That the granting act of June 20, 1910, supra, the provisions of the Constitution of the State of New Mexico, the enactment by the legislature of said State and the proclamation admitting said State into the Union, all of which are referred to hereinbefore, constituted a contract between the United States, and said State of New Mexico, the indemnity and lieu grant contained in said act of June 20, 1910, by the reference therein to amended sections 2275 and 2276, Revised Statutes, supra, being as much a part of said contract itself as the grant therein and thereby made of sections 2, 16, 32 and 36 of every township; and said granting act and contract conferred and was intended to confer upon the grantee, the State of New Mexico, a substantial right to the amount of lands within the description of "surveyed, unreserved, unappropriated, and non-mineral public lands of the United States," as provided in section 11 of said act of June 20, 1910, which might be necessary to fill and satisfy losses to the grant of specific sections 2, 16, 32 and 36; and while the indemnity and lieu lands so granted by the act of June 20, 1910, are required to be

selected under the direction of the Secretary of the Interior, the authority of the Secretary is limited to the exactions found in said granting act, namely, that at the date of the indemnity or lieu selection of any particular tract or tracts of land, tendered to and certified by the local land officers, there existed no adverse claim to or a reservation of the land selected, that the land is not known to contain mineral of value, and that good and valid base is offered for the indemnity or lieu selection; no discretion or authority being vested in said Secretary by the provisions of said act of June 20, 1910, supra, either to lessen, impair or defeat said indemnity and lieu grant, either in whole or in part, and no discretion or authority being vested in either the Secretary of Agriculture or the President of the United States by the provisions of said act of June 20, 1910, supra, either to lessen, impair or defeat said indemnity and lieu grant, either in whole or in part, by eliminating the base lands which support the indemnity or lieu selection from the public reservation in which such base lands were located at the time of perfecting of the selection.

X. That the State of New Mexico has always fully complied with each, every and all of the terms, conditions, stipulations and requirements of said land grant and has by acts of its legislature and its executive and administrative officers provided for and effected public education within said State in accordance with every intendment of such land grant and has also provided for, constructed and maintained the public institutions which were to be, and are, aided by such land grant, all of which has necessarily been beneficial to the United States as well as to the State of New Mexico. That the State of New Mexico has always conformed to and abided those regulations and those rules of practice in and before the General Land Office and the Department of the Interior of the United States (35 L. D., 537; 38 ibid. 611; 39 ibid, 39), which control and govern in the matter of selections of public lands of the United States under grants to the States for educational and other purposes.

XI. That the land grant aforesaid to the State of New Mexico for the support of common schools remains unadjusted in that the said State has neither acquired the legal title to all of the lands granted, to wit, sections two, sixteen, thirty-two and thirty-six of every township within said State nor acquired legal title to all the lands which it has, in the terms of said grant, a right to select in indemnity for or in lieu of said sections. That the fact that such grant remains unadjusted and unsatisfied has not been due to any neglect, failure or default upon the part of said State, but is attributable, in the main, to the fact that a large portion of the area of the State of New Mexico remains unsurveyed, and to the further fact that many of said sections are within public reservations established under authority of the United States. That any condition whatever which is responsible for inability on the part of the State of New Mexico promptly to acquire title to the sections granted to it for common school pur-

poses or any incident in the prosecution before the Department of the Interior of the said State's selections of indemnity or lieu lands for said sections which results either in an unlawful denial by said Department of such selections or in unreasonable delay in the approval thereof, is seriously detrimental to the highest public interests of the said State and inflicts upon said State an irreparable injury and financial loss.

XII. That to insure as far as possible against any impairment of the value of the said land grant to the State of New Mexico by enabling said State to protect itself against losses of sections 2, 16, 32, and 36 in place, as well as against losses of lands subject to appropriation by it under the grant to it of indemnity and lieu lands, it was provided by section eleven of the act of June 20, 1910, supra, that—

* * * "after its admission into the Union said State may procure public lands of the United States within its boundaries to be surveyed with a view to satisfying any public land-grants made to said State in the same manner prescribed for the procurement of such surveys by Washington, Idaho, and other States, by the act of Congress approved August eighteenth, eighteen hundred and ninety-four (Twenty-eight Statutes at Large, page three hundred and ninety-four), and the provisions of said act, in so far as they relate to such surveys and the preference right of selection, are hereby extended to the said State of New Mexico."

That said act of August 18, 1894, as thus extended to New Mexico, provides:

"* * * That is shall be lawful for the governors of the States of Washington, Idaho, Montana, North Dakota, South Dakota and
11 Wyoming to apply to the commissioner of the General Land Office for the survey of any township or townships of public land then remaining unsurveyed in any of the several surveying districts, with a view to satisfy the public land grants made by the several acts admitting the said States into the Union to the extent of the full quantity of land called for thereby; and upon the application of said governors the commissioner of the General Land Office shall proceed to immediately notify the surveyor general of the application made by the governor of any of the said States of the application made for the withdrawal of said lands, and the surveyor general shall proceed to have the survey or surveys so applied for made, as in the cases of surveys of public lands; and the lands that may be found to fall within the limits of such township or townships, as ascertained by the survey shall be reserved upon the filing of the application for survey from any adverse appropriation by settlement or otherwise except under rights that may be found to exist of prior inception, for a period to extend from such application for survey until the expiration of sixty days from the date of the filing of the township plat of survey in the proper district land office, during which period of sixty days the State may select any of such lands not embraced in any valid adverse claim, for the satisfaction of such grants, with the condition, however, that the governor of the State,

within thirty days from the date of such filing of the application for survey, shall cause a notice to be published, which publication shall be continued for thirty days from the first publication, in some newspaper of general circulation in the vicinity of the lands likely to be embraced in such township or townships, giving notice to all parties interested of the fact of such application for survey and the exclusive right of selection by the State for the aforesaid period of sixty days as herein provided for; and after the expiration of such period of sixty days any lands which may remain unselected by the State, and not otherwise appropriated according to law, shall be subject to disposal under general laws as other public lands: And provided further, That the commissioner of the General Land Office shall give notice immediately, of the reservation of any township or townships to the local land office in which the land is situate of the withdrawal of such township or townships, for the purpose hereinbefore provided: And provided further, That the governors of the several States herein named are authorized to advance money from time to time for the survey of the townships withdrawn at such United States depository as may be designated by the commissioner of the General Land Office, and the money so advanced shall be reimbursable. The foregoing provisions shall be applicable to Utah when admitted as a State into the Union and a governor is duly inaugurated and acting. * * *"

XIII. That invoking and availing of the provisions of said act of August 18, 1894, the State of New Mexico made application to the commissioner of the General Land Office for a withdrawal and survey thereunder and on August 24, 1914, there was duly with-
12 drawn and reserved under said act a large area of then unsurveyed land in said State. That a part of the area so withdrawn and reserved was found, after survey, to be within the boundaries of township 23 south, range 38 east of the New Mexico principal meridian. That the approved plat of survey of said township was filed in the United States land office at Roswell, New Mexico, on March 9, 1915; and the entire area of said township is designated as being of the character of land enterable under the enlarged homestead act of February 19, 1909 (35) Stat. 639).

XIV. That the approved plat of the survey of township 19 south, range 14 east, New Mexico principal meridian, in the State of New Mexico, was filed in the appropriate local United States land office in the then Territory of New Mexico on June 24, 1885. That the title to sections numbered 16 and 36 in said township passed from the United States to said Territory on June 21, 1898, by operation of the act of Congress of that date, supra, which act made a grant of sections 16 and 36 in every township to said Territory. (Vide Tillian et al. vs. Keepers, 44 L. E., 460.)

That on December 20, 1906, the Secretary of the Interior withdrew all of said township 19 south, range 14 east for the then proposed Sacramento National Forest and by Executive proclamation of April 24, 1907, the entire township was included in the then, and

thereby established Sacramento National Forest. That by Executive proclamation of March 2, 1909, the name of the forest was changed to Alamo National Forest and by Executive proclamation of October 20, 1910, certain lands, but other than those pertinent to this cause, were excluded from, and others added to, said forest. That by Executive order of February 17, 1912, certain lands, but other than those pertinent to this cause, were excluded from the said forest. That by Executive order of March 30, 1915, certain lands, but other than those pertinent in this cause, were withdrawn with view to determining the advisability of their inclusion in the said forest and by Executive proclamation of April 3, 1916, section 36 of said township 19 south, range 14 east, and other lands, were excluded from said forest.

XV. That the State of New Mexico is limited in its selection of indemnity and lieu lands to such thereof as have been surveyed thus preventing selection thereof until after the official plat of the survey thereof shall have been filed in the local land office of the district wherein the lands are situate, when it is required to make formal presentation of its claim at such local land office through selection. That in due exercise of its "exclusive right of selection" for sixty days from the date, to wit, March 9, 1915, of the filing of the approved plat of survey of said township 23 south, range 38 east, N. M. P. M. in the United States land office at Roswell, New Mexico, which "exclusive right" had been conferred by the provision in the act of June 20, 1910, supra, which extended the benefits of the act of August 18, 1894, supra, to the State of New Mexico, the said State,

13 through and by the joint action of its governor, its attorney general and its commissioner of public lands filed in the said United States land office a selection (known as a State lieu selection 031,065, Roswell series) of the W. ½ of section 29 of said township 23 south, range 38 east, and other lands, in lieu of the N. ½ of section 36 of said township 19 south, range 14 east, and other lands. That at the time of filing of such selection the said N. ½ of section 36 of said township was then situate within the said Alamo National Forest and was therefore good, sufficient, and valid base for such lieu selection which was made and filed under the acts of June 21, 1898, supra, June 20, 1910, supra, sections 2275 and 2276, Revised Statutes, as amended by the act of February 28, 1891, supra, and supplementary and amendatory acts.

That such lieu selection was supported by a non-mineral, non-saline and non-occupancy affidavit with respect to the said selected land, and was accompanied with a deed by quit-claim executed by the State land commisisoner of the State of New Mexico in accordance with authority given that officer by the act of the Legislature of the State of New Mexico of June 14, 1912, supra, conveying to the United States all the right, title, claim, interest, and estate of said State in and to the said N. ½ of section 36 of township 19 south, range 14 east, and was accompanied also with a certificate by the clerk of the county of Otero, New Mexico, to the effect that the base or school

section land to which the said State had theretofore acquired title, had not been conveyed or encumbered by it, all of which proof in support of the validity and sufficiency of such selection was adduced at considerable expense to said State.

That such selection was also accompanied with the fees collectible by law, and otherwise met, in every requirement, the rules and regulations of the Department of the Interior in respect of the making and filing of selections of lieu lands by the several land grant aided States of the Union. That acting on such selection, the register of the Roswell office designated the Lovington Leader, a newspaper published at Lovington, New Mexico, as the medium of publication of notice of the selection, and notice thereof was published accordingly, and for five consecutive weeks, commencing with the issue of that paper of May 28, 1915, and ending with the issue of June 25, 1915, at the expense of the State of New Mexico. That notice of such selection was posted in the office of the register and receiver during the same period, and at expiration of the period of notice the register certified that no protests or objections of any character whatever had been made to the selection, which bears the following certificate over the signatures of the register and receiver:

"We certify that the foregoing list No. 5402 of indemnity school land selections, containing 640 acres, was filed in this office March 9, 1915, accompanied with legal fees amounting to $4.00; that there is not of record in this office any adverse, filing, entry or claim to the land selected by the State of New Mexico, and that the filing of said list is this day allowed and approved."

14 That the foregoing certificate is one affirming the sufficiency and validity of the base lands conveyed to the United States in support of and in consideration for the lands selected in lieu thereof and is one also affirming the legal availability of the lieu lands so selected.

XVI. And the State of New Mexico further avers that in and by its said lieu selection it duly executed a perfect deed of conveyance to the United States of all the right, title, claim, interest, and estate of the State of New Mexico in and to the lands assigned as the base for such selection; that delivery of such conveyance was made by the State to the register and receiver at Roswell, New Mexico, as the duly authorized and only agents of the United States competent to receive such conveyance; that said register and receiver formally received such conveyance on behalf of the United States when they executed the certificate aforesaid.

That in accordance with the rules, regulations, and practice of the Department of the Interior, the said register and receiver duly transmitted said conveyance and said certified lieu selection to the Commissioner of the General Land Office for appropriate consideration and ultimate acceptance by the Secretary of the Interior of such conveyance and the approval by said Secretary to the State of New Mexico of the land it had selected as the consideration for the lands it had reconveyed to the United States. That on April 13, 1915,

due and full notice of such selection was received in the General Land Office at Washington, D. C., from said register and receiver, That on August 23, 1915, there was received in said General Land Office proof of the posting and publication of notice of said lieu selection and thereupon, if not before, said selection was rendered complete and perfect. That no question has ever been raised either in or out of the Department of the Interior as to the sufficiency of the compliance made by the State of New Mexico with the terms, conditions, and stipulations of the land grant to said State and with the regulations of the Department of the Interior in respect to said selection. That the acts and decisions of the Land Department on said selection concede that it was a selection perfect in every detail and unassailable on any ground or for any reason from the date of the making thereof and for nearly a year thereafter.

XVII. That while the certain lieu selection aforesaid was so certified by the said register and receiver and, thereupon, forwarded to the Commissioner of the General Land Office for appropriate action and disposition, as above, no action was had thereon when, on April 3, 1916, as aforesaid, the land assigned as the base for such selection and described in the said deed of conveyance by the State of New Mexico to the United States was eliminated from the Alamo Forest by an Executive proclamation of that date, said proclamation having been expressly executed and issued under authority of section 24 of the act of Congress of March 3, 1891 (26 Stat. 1095, 1103) and the provisions of the act of Congress of June 4, 1897 (30 Stat.
15 11, at 34 & 36), which relate exclusively to the establishment, disestablishment, management, control, and administration of national forests and in nowise to the land grant to the State of New Mexico. That said provisions of law are in words following, to wit:

"That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth whether of commercial value or not, as public reservations, and the President shall by public proclamation, declare the establishment of such reservations and the limits thereof." (Section 24, act of March 3, 1891, supra.)

"That, to remove any doubt which may exist pertaining to the authority of the President thereunto, the President of the United States is hereby authorized and empowered to revoke, modify, or suspend any and all such Executive orders and proclamations, or any part thereof, from time to time as he shall deem best for the public interests." (Act of June 4, 1897, 30 Stat., 11 at 34.)

"The President is hereby authorized at any time to modify any Executive order that has been or may hereafter be made establishing any forest reserve, and by such modification may reduce the area or change the boundary lines of such reserve, or may vacate altogether any order creating such reserve." (Act of June 4, 1897, 30 Stat., 11 at 36.)

XVIII. And the State of New Mexico shows that, thereafter, and on May 16, 1916, the defendant, Commissioner of the General Land Office, by his office letter, held for rejection and cancellation the State's lieu selection aforesaid, upon the ground, and upon that ground only, that the lands which the State had offered as a base for such selection and had conveyed to the United States had been eliminated or excluded from the Alamo National Forest by and under said Executive proclamation of April 3, 1916; (the elimination and exclusion, however, having been made long subsequent to the perfecting of the lieu selection by the State, as above shown).

That the State duly appealed from the decision of the defendant, Commissioner of the General Land Office, to the defendant, Secretary of the Interior; assigning as error, the following:

In holding the base of such selection bad and the State's conveyance of the base land to the United States unacceptable because of the Executive proclamation of April 3, 1916.

Error in holding that the State's right to convey the base land, which was secured to it by a solemn contract between it and the Government, and where the State has long since performed its part of the contract and fully earned its right to convey the base land, can now be impaired or defeated by the President in and under a subsequent Executive proclamation excluding the base land from the Alamo National Forest.

Error in holding that the President by excluding the base land from such forest, or otherwise, however, can deprive the State grantee of rights under its land grant, either in whole or in part.

16 But the State says that said Secretary, by his decision, dated October 14, 1916, affirmed the said decision of the commissioner his decision in respect of the question raised upon said appeal being thus—

"The base lands in question are certain sections 2, 16 and 36, which were within a national forest, but have recently been eliminated therefrom and remain a part of the grant for school purposes. The State's selection not having been approved prior to such elimination, cannot now be allowed."

XIX. That the State, thereupon, and within the time therefor limited by the regulations and rules of practice of the Department of the Interior, filed motion for rehearing of the certain departmental decision aforesaid; but the same was thereafter, on the 23rd day of November, 1916, overruled and denied by the defendant, Secretary of the Interior, who, after citing in support of his denial of such motion a decision rendered by said defendant, Secretary of the Interior, on October 7, 1915, in State of California et al. (44 L. D., 468), said that it was therein "held that no right was acquired by the selection prior to approval such as would prevent 'a change in the status of either the selected land or the proffered base.'"

That the State, thereupon, filed a petition in the Department of the Interior praying for the exercise of the supervisory authority of

the defendant, Secretary of the Interior, to sustain the said selection by the State as a sufficient and perfect selection made by said State in the legitimate enjoyment of the grant of lands made to it by Congress; but such petition was thereafter, on the 18th day of October, 1917, denied by the defendant, Secretary of the Interior, and the record in said selection returned to the defendant, Commissioner of the General Land Office, for the purpose to make final the decision adverse to the State of New Mexico.

That in respect of the question presented and discussed in said petition for exercise of supervisory authority the decision of the defendant, the Secretary of the Interior, of October 18, 1917, announced the following ruling and conclusion, to wit:

"The department therefore concludes that the State took title to the base lands tendered in support of the selection under its grant, that title thereto was at all times thereafter, prior and subsequent to restoration of said lands from the forest reservation, and is now, in the State of New Mexico, and the very condition upon which the right of the State to offer said lands in exchange for others is predicated having been removed by elimination of the base lands from the forest reserve, the department is without authority of law to approve the selection.

"The decision rendered by the department in the case of State of California et al. (44 L. D., 468) is accordingly adhered to without prejudice to the State's right to substitute new base in support of the selection in accordance with the principle laid down in the case of State of California et al. (45 L. D., 644)."

17 That on November 15, 1917, the defendant the Commissioner of the General Land Office sought to make final the said decision of the defendant the Secretary of the Interior of October 18, 1917, by an office letter of the said commissioner to the register and receiver at Roswell, New Mexico, which contains this statement:

"In accordance with the said decision of October 18, 1917, and in the absence of prior valid adverse claim, you will advise the proper State officer that thirty days from receipt of notice hereof are allowed within which to designate other and valid base in support of his application to reinstate, and that in default of same within the time allowed, the order of cancellation of December 14, 1916, will be considered final and the case closed without further notice from this office."

XX. And the State of New Mexico says that it has now completely exhausted its rights of appeal, review, and rehearing in said Department of the Interior, and in said General Land Office, in respect of its claim under and by reason of said lieu selection, and that no further opportunity for hearing or review of the question aforesaid, or for the further assertion therein of its claim under such lieu selection, is afforded by the regulations and rules of practice of said department, or by any law or act of Congress in such case made and provided; and that its only remaining remedy is by appropriate ap-

peal to the courts for relief from the rulings aforesaid, and which rulings, as the State is advised by its counsel, and, accordingly, so avers, are erroneous in matters of law.

XXI. And the State of New Mexico further says that, by its full and unqualified acceptance of the grant of lands made to it by Congress for common school purposes as hereinabove mentioned, and by said State's full compliance with all the terms, conditions, and exactions of such grant, the right and title to the lands selected by it under its said lieu selection has been fully earned, and that the same are needed in partial satisfaction of such grant, and that the base assigned in such lieu selection has been, by said State, conveyed to the United States; but that, nevertheless, the right of the State of New Mexico in the premises is sought to be defeated by the unauthorized and arbitrary action of the defendants, as herein aforesaid.

XXII. And the State of New Mexico further states that if the certain action hereinabove set forth be permitted to stand, it will deprive the State of New Mexico of its rights under the land grant made to it by Congress as aforesaid and will impose conditions upon said State not provided for in said grant, will impair and diminish the value of said grant to said State and will unjustly and unlawfully exact from the State of New Mexico a consideration for the lands so selected by it, as aforesaid, different from the consideration therefor which has heretofore been conveyed to the United States by the deed of quit claim executed by said State's commis-
18 sioner of public lands which accompanied and was made a part of said lieu selection; will be in violation of the statutory contract accomplished and effected by said granting act of June 20, 1910, supra; will limit, and, to the extent of the tract of land described in said lieu selection as the base therefor, will defeat the will of Congress as expressed in said grant, and this too after the said grantee has performed, in full, the several conditions in consideration whereof the grant was made; and will further result in the rejection and cancellation of numerous other lieu selections by said State involving many hundreds of acres of land and in the unlawful deprivation of the property of the State of New Mexico without compensation, and without the consent of said State, all to its irreparable loss, damage, and injury, and for which the State of New Mexico has no adequate remedy at law, and is otherwise remediless, except in equity.

Wherefore, the premises considered, the State of New Mexico prays:

I. That the process of this court issue directed to the defendants, Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, requiring them, and each of them, to appear and make answer under the foregoing bill of complaint, but not under oath, answer under oath being hereby expressly waived.

II. That, upon the filing of this bill, or at such short day thereafter as shall be fixed by the court, a preliminary order may issue herein restraining and enjoining, pendente lite, the defendants, their successors in office, and each, every and all persons claiming to act under their, or either of their, authority or control, from enforcing any or either of the certain rulings, holdings, and decisions mentioned and complained of in the foregoing bill of complaint, or from canceling or rejecting the certain lieu selection so heretofore made by the State of New Mexico of the W. ½ of section 29, township 23 south, range 38 east, New Mexico principal meridian, New Mexico, in lieu of the N. ½ of section 36, township 19 south, range 14 east, New Mexico principal meridian, New Mexico, or from exacting from the State of New Mexico a tract of land as base land for such lieu selection other and different from base land now offered and supporting such selection and heretofore conveyed by the State of New Mexico to the United States.

III. That, upon final hearing, said restraining order and injunction may be made perpetual, and that mandatory injunction may issue against said defendants, commanding and requiring that each of the certain rulings, holdings, and decisions aforesaid be vacated and set aside and that the right granted and secured to the State of New Mexico under the certain granting act herein aforesaid be recognized, respected, and given its full legal force and effect, excluding from any and all consideration in connection with the said State's lieu selection of the tracts aforesaid, the certain Executive proclamation of April 3, 1916, referred to in the foregoing bill of complaint.

19 IV. And that the State of New Mexico may have all such other and further relief as the nature of its case may demand and require, and as may be agreeable to equity.

THE STATE OF NEW MEXICO,
By HARRY L. PATTON,
Attorney General.
MILTON J. HELMICK,
Assistant Attorney General, Santa Fe, New Mexico.

PATRICK H. LOUGHRAN,
Attorney for Plaintiff, Washington, D. C.

The defendants to this bill of complaint are:

1. Franklin K. Lane, Secretary of the Interior.
2. Clay Tallman, Commissioner of the General Land Office.

STATE OF NEW MEXICO,
County of Santa Fe, ss:

Before me, the undersigned, a notary public in and for the county of Santa Fe, State of New Mexico, personally appeared Harry L. Patton, who, being by me first duly sworn, on oath, says: That he is

the attorney general of the State of New Mexico, said State being the plaintiff named in the foregoing and annexed bill of complaint; that he has read the foregoing bill of complaint and is acquainted with the contents thereof, and that the several matters and things therein set forth and contained are true, as he verily believes, and that as such attorney general he is authorized to file said bill.

HARRY L. PATTON.

Subscribed and sworn to before me this 28 day of Nov., 1917.

F. MULLER, [SEAL.]
Notary Public, Santa Fe County, New Mexico.

My commission expires July 1, 1921.

STATE OF NEW MEXICO,
County of Santa Fe, ss:

Before me, the undersigned, a notary public in and for the county of Santa Fe, State of New Mexico, personally appeared Milton J. Helmick, who, being by me first duly sworn, on oath, says: That he is the assistant attorney general of the State of New Mexico, said State being the plaintiff named in the foregoing and annexed bill of complaint; that he has read the foregoing bill of complaint and is acquainted with the contents thereof, and that the matters and things therein set forth and contained are true, as he verily believes.

MILTON J. HELMICK.

20 Subscribed and sworn to before me this 28 day of Nov., 1917.

[SEAL.] F. MULLER,
Notary Public, Santa Fe County, New Mexico.

My commission expires July 1, 1921.

Answer of Defendants.

Filed January 21, 1918.

* * * * * * *

Come now the defendants by their attorneys and, in answer to the bill of complaint herein filed, say:

1–9. They admit the averments of paragraphs 1 to 9 of this bill, except as to the conclusions of law therein contained.

10. They have no knowledge as to the facts averred in paragraph 10, except that they admit that the plaintiff has conformed to rules and regulations prescribed by the Department of the Interior in the matter of lieu selections of public lands.

11–14. They admit the averments of paragraphs 11 to 14, inclusive.

15. They admit the averments contained in the first paragraph of paragraph 15 of the bill. Photostatic copy of the face and reverse sides of the State selection known as Roswell 031,065, therein

referred to, is hereto attached, marked Exhibit A 1 and 2, and is hereby made a part of this answer.

Answering the averments of the second paragraph of said paragraph 15, they admit that said selection was accompanied by a nonmineral, nonsaline, and nonoccupancy affidavit, copy of which appears on the face of said Exhibit A; but deny that said selection was accompanied by a deed of quitclaim as averred in said paragraph. They also admit that said selection was accompanied by a certificate to the effect that the plaintiff had not conveyed or encumbered the title to the base land described in said selection; and copy of said certificate is hereto attached, marked Exhibit B, and is made a part of this answer.

Answering the averments of the third paragraph of paragraph 15, they admit that plaintiff paid the fees collectible by law and that the register and receiver certified to such facts, as appear in their certificate copied on page 2 of Exhibit A, but deny that they certified to any facts other than as appear in said certificate in connection with the filing of said selection.

Answering the final paragraph of paragraph 15, they are advised and consequently aver, that the same presents conclusions of law which they need not answer.

16. Answering the averments of the first paragraph of paragraph 16, they admit that plaintiff delivered said lieu selection to the register and receiver, Roswell land office, New Mexico, who received the same; but that whether said lieu selection thus delivered and received is, or amounts to, a perfect deed of conveyance, is, as they are
21 advised, purely a conclusion of law; and that if lieu selection does in law amount to a conveyance, then they deny that the register and receiver are the duly authorized and only agents of the United States competent to receive such conveyances, stating the fact to be that said officers are only authorized to receive said lieu selection for the purpose of transmitting the same to the defendants for ultimate action—that is, either to approve or reject the same.

Answering the second paragraph, they admit that said register and receiver duly transmitted the said lieu selection with their certificate, the same being defendants' Exhibits A and B aforesaid, to the Commissioner of the General Land Office, but state that the purpose thereof was to afford to the defendants opportunity for appropriate consideration and for action, not necessarily acceptance, upon the selection as required by statute. They admit that the selection was received on April 13, 1915, as averred, and that on August 23, 1915, proof of posting and publication of notice was also received as averred. They deny, however, that no question was raised as to the sufficiency of compliance with the requirements of law by the plaintiff in respect of said selection or that said selection was conceded to be perfect in every detail and unassailable on any ground or for any reason; and, on the contrary, they aver that said selection list was in part defective for the reason that a portion was invalid because not

supported by a sufficient amount of valid base; that when the said selection list was received by the Commissioner of the General Land Office and by him considered with a view of recommending to the Secretary of the Interior whether the said selection should be approved or disapproved, in whole or in part, he found and determined that a part of the base offered to support a part of the selection was insufficient, and held the same for cancellation by his decision of June 21, 1915, copy of which is hereto attached, marked "Exhibit C," and made a part of this answer; but thereafter, by affidavit, dated July 19, 1915, of the commissioner of public lands of the State of New Mexico, copy of which is hereto attached, marked "Exhibit D." and made a part hereof, the plaintiff adjusted its selection by the substitution of other base, which adjustment was thereafter allowed.

17. They admit the averments of fact contained in paragraph 17 of the bill.

18. They admit that plaintiff's said lieu selection was rejected by the Commissioner of the General Land Office on May 16, 1916, by decision, copy of which is hereto attached, marked "Exhibit E." and is hereby made a part of this answer; and that on October 14, 1916, said decision was affirmed on appeal to the Secretary in an opinion hereto attached, marked "Exhibit F," and made hereby a part of this answer.

19. Answering the averments of paragraph 19, they admit that thereafter and within the time limited by the Rules of Practice, plaintiff filed a motion for rehearing, and that said motion was denied, November 23, 1916, in a decision, copy of which is hereto attached, marked "Exhibit G," and made a part of this answer; and they further state that pursuant to said decision, the Commis-
22 sioner of the General Land Office, on December 14, 1916, in an order to the register and receiver aforesaid, copy of which is hereto attached, marked "Exhibit H," and made a part hereof, cancelled the lieu selections aforesaid, in part, including the land here in controversy, as more particularly set forth in said order.

Thereafter, they aver, the plaintiff applied for the reinstatement of this and other rejected lieu selections in a letter, dated December 28, 1916, copy of which is hereto attached, marked "Exhibit J," and made a part hereof; that said application for reinstatement was not acted upon, but thereafter, on plaintiff's petition for the exercise of supervisory authority, the subject matter of the controversy was again considered, and a decision was rendered, October 18, 1917, as averred in said paragraph 19 of the bill; copy of which decision is hereto attached, marked "Exhibit K," and made a part hereof.

They admit the averments of the final paragraph of said paragraph 19.

20. They admit all averments of fact in paragraph 20 of the bill.

21. They are advised that the averments of paragraph 21 present mere conclusions of law which they need not answer.

22. Answering the averments of paragraph 22, they deny that the action complained of will deprive the plaintiff of its rights under its school land grant or that it will impair or diminish the value of said grant; that, on the contrary, the action of which plaintiff complains has no further effect than to require said plaintiff to substitute valid base, i. e., lands within the terms of its grant which it has really lost, if the plaintiff is desirous of acquiring title to the particular tracts of land covered by its selection list aforesaid. They aver that by operation of the action complained of plaintiff retains title to the lands actually described in the land grant under which it claims, and that the plaintiff has sustained, and will sustain, no loss, damage, or injury, irreparable or otherwise, by reason of any action of the defendants set forth in its bill of complaint.

And in further answer to the bill, they aver the essential facts to be as follows: That plaintiff had title to the described base land under its school land grant, which said land was thereafter included within a national forest; that under existing law, the plaintiff had the privilege of waiving its claim to said land and to select other land of equal acreage, non-mineral in character, in lieu thereof, under the direction and subject to the approval of the Secretary of the Interior; that the Secretary's power to approve such an exchange depended upon the fact whether or not the base land was included within a national forest reservation; that, if such were not the fact, he had no authority to effect the conveyance of other public land of the United States to the plaintiff; that when the selection list described in plaintiff's bill came on in regular course before him for action, either to approve or disapprove the same and to effect or decline to effect the exchange of lands, he found and determined, and the fact is, that said base land had been excluded

23 and released from forest reservation and afforded no proper or valid base to support the selection of the land desired by the plaintiff and here in controversy; wherefore, exercising his discretion and discharging his duty within the limitations prescribed by existing law, he was unable to approve the exchange, and therefore disapproved the selection so long as it was based upon the particular tracts released from the forest reservation, permitting, however, the plaintiff within a reasonable time to substitute new base if it should continue to desire to acquire title to the selected lands; that his action, it being the action of which plaintiff complains, involved the exercise of judgment and discretion in a matter placed exclusively by law within his jurisdiction; and that the purpose and effect of this bill is wholly and merely to secure a review of his action by this court, as by direct appeal, where by law no such appeal or right of review by the courts is authorized or provided.

And they furthermore aver that as appears on the face of the pleadings herein, the determination of the matters of law and fact presented and the granting of the relief sought involve the title to

the land in controversy and require an adjudication by the court that by operation of matters of fact set forth in the bill and the law applicable thereto, title to said land has passed out of the United States and has vested in the plaintiff, notwithstanding the fact that said selection list, as to said land, stands rejected and canceled on the records of the land department, in the absence of the United States as a necessary party to the proceeding.

Wherefore, having made complete answer to the bill of complaint, they pray that said bill may be dismissed with their reasonable costs and that they may be permitted to go hence without day.

FRANKLIN K. LANE,
Secretary of the Interior.
CLAY TALLMAN,
Commissioner of the General Land Office.

By their attorneys:

CHARLES D. MAHAFFIE,
Solicitor;
C. EDWARD WRIGHT,
Assistant Attorney.

(Here follow drawings marked pages 23A and 23B.)

24 EXHIBIT B.

(Copy.)

5402—Roswell.

List —. Serial 031065.

STATE OF NEW MEXICO,
County of Otero:

MAY 29, 1915.

I, Chas. E. Thomas, county clerk in and for the county and State aforesaid, do hereby certify that, according to the records of my office, the State of New Mexico has not sold, transferred, or in any manner conveyed, or incumbered, nor has it agreed to sell, transfer, or in any manner convey, or incumber, its title in or to the following described lands, to-wit:

Secs. 32–19S–14E and 36–19S–14E, N. M. P. M.

In witness whereof I have set my hand attached the seal of said county at my office in said Otero County, this 15th day of March, A. D. 1915.

CHAS. E. THOMAS,
County Clerk.

[SEAL.]

EXHIBIT C.

(Copy.)

Roswell 031065. "G," J. C. D.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, June 21, 1915.

Selection held for cancellation in part.

REGISTER AND RECEIVER, *Roswell, New Mexico.*

SIRS: On March 9, 1915, there was filed in your office by the State of New Mexico, indemnity school land selection 031065, in which the SE. ¼ SW. ¼, sec. 28, T. 23 S., R. 38 E., was selected in lieu of the SE. ¼ SW. ¼, sec. 32, T. 19 S., R. 14 E., within the boundaries of the Alamo National Forest.

An examination of the records of this office shows that on the same date the State offered 17.05 acres of the SE. ¼ SW. ¼, sec. 32, T. 19 S., R. 14 E., as part base in selection 031064, your series.

25 The SE. ¼ SW. ¼, sec. 28, T. 23, S., R. 38 E., is not, therefore, supported by sufficient amount of valid base, and the selection is hereby held for cancellation as to said tract.

You will notify the State hereof and allow thirty days from receipt of notice for an appeal to the department; in default of which, the cancellation will be made without further notice from this office.

Copy inclosed for service.

Very respectfully,

(Signed) D. K. PARROTT,
Assistant Commissioner.

EXHIBIT D.

(Copy.)

DEPARTMENT OF THE INTERIOR,

UNITED STATES LAND OFFICE AT ROSWELL, NEW MEXICO.

Serial 031065. "G," J. C. D. List 5402.

STATE OF NEW MEXICO,
County of Santa Fe, ss:

Robert P. Ervein, commissioner of public lands of the State of New Mexico, upon first being duly sworn deposes and says: That I am the official having in charge the selection of lands granted the State by acts of Congress, and the clerical work incident thereto: That in lieu land list No. 5401, serial 031064, by clerical error in offering base lands for the selection of lots 2, 3, and 4, sec. 28 T. 23 S., R. 38 E., 3.38 acres, 6.84 acres and 6.83 acres of the SE. ¼ SW. ¼, sec. 32, T. 19 S., R. 14 E., was given when it was the intention of the State to use the fractional parts of the SE. ¼ NE. ¼,

sec. 32, T. 19 S., R. 14 E., as base lands for the selection of said lots: Permission is therefore requested to make the necessary substitutions in lieu of lands so erroneously used.

ROBT. P. ERVEIN,
Commissioner of Public Lands.

Subscribed and sworn to before me this 19th day of July, 1915.

W. E. GRIFFIN,
Notary Public.

[SEAL.]

My commission expires July 17, 1917.

26 EXHIBIT E.

(Copy.)

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE.
Washington, May 16, 1916.

Selection held for cancellation in part.

REGISTER AND RECEIVER, *Roswell, New Mexico.*

SIRS: On March 9, 1915, the State of New Mexico filed in your office indemnity school land selection No. 031065, selecting therein in part the W. ½ N. ½ SE. ¼ and SW. ¼ SE. ¼, sec. 29, T. 23 S., R. 38 E., in lieu of the N. ½, N. ½ SW. ¼ and SW. ¼ SW. ¼, sec. 36, T. 19 S., R. 14 E., within the boundaries of the Alamo National Forest.

It is shown by the records of this office that by proclamation dated April 3, 1916, sec. 36, T. 19 S., R. 14 E., N. M. P. M., was eliminated from the Alamo National Forest, which in view of sec. 6 of the act of June 20, 1910 (36 Stat., 562), which reads in part as follows:

"That the grants of secs. two, sixteen, thirty-two, and thirty-six to said State, within national forest now existing or proclaimed, shall not vest the title to said sections in said State until the part of said national forests embracing any of said sections is restored to the public domain," leaves the portion of the selection described unsupported by valid base, as no reason is known why the State may not assert title to said base tracts under the provisions of the act quoted.

The selection is therefore, hereby held for cancellation, subject to the right of appeal, to the department within thirty days from receipt of notice of the substitution of other and valid base therefor, within said time. You will notify the State thereof, and that in default of any action by it within the time allowed, the cancellation will be made, without further notice from this office.

Copy inclosed for service.

Very respectfully,

(Signed) C. M. BRUCE,
Assistant Commissioner.

5-12 M. S.

27 EXHIBIT F.

(Copy.)

DEPARTMENT OF THE INTERIOR,
Washington, October 14, 1916.

D-33272. "G." Roswell 031065, 031066, 031068, 033671.

State's Lieu Selections Canceled. Affirmed.

Ex Parte State of New Mexico.

Appeal from the General Land Office.

The State of New Mexico, by its commissioner of public lands, has appealed from the decisions of May 16, 24, and 26, 1916, holding for cancellation selections of lands in sections 29, 30, and 33, T. 23 S., R. 38 E., and in sec. 30, T. 14 S., R. 33 E., N. M. P. M., Roswell, New Mexico, land district, for the reason that the base lands offered are not properly subject to such exchange.

The base lands in question are in certain sections numbered 2, 16, and 36, which were within a national forest, but have recently been eliminated therefrom and remain a part of the grant for school purposes. The State's selection not having been approved prior to such elimination, can not now be allowed.

The decision is correct and is affirmed.

(Signed) BO SWEENEY,
Assistant Secretary.

28 EXHIBIT G.

(Copy.)

DEPARTMENT OF THE INTERIOR,
Washington, November 23, 1916.

D-33272. "G." Roswell 031065, 031066, 031068, 033371.

State's Lieu Selection Cancellation Affirmed. Denied.

Ex Parte State of New Mexico.

Motion for rehearing of departmental division of October 14, 1916.

The State of New Mexico has filed its motion for a rehearing of departmental decision of October 14, 1916, canceling its lieu selection of lands in secs. 29, 30, and 33, T. 23 S., R. 38 E., and in sec. 30, T. 14 S., R. 33 E., N. M. P. M., Roswell, New Mexico, and district.

The argument made, which is based on the allegation, in substance, that the decision erred in its consideration of the facts and in its application of the law thereto, can not be entertained. Both the facts and law were understood when the decision was rendered and in the absence of evidence now that would establish error the decision must be allowed to stand.

This case is in all respects similar to the case of State of New Mexico, Roswell 030929, this day decided, in which the questions presented are more fully discussed.

The motion is denied.

(Signed) ALEXANDER T. VOGELSANG,
First Assistant Secretary.

29

EXHIBIT H.

(Copy.)

Roswell 031065–031066–031068 & 033371. "G," J. C. D.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, December 14, 1916.

Copies of departmental decision enclosed. Selections canceled in part.

REGISTER AND RECEIVER, *Roswell, New Mexico.*

SIRS: I am enclosing herewith copies of departmental decision of November 23, 1916, upon the State's motion to review departmental decision of October 14, 1916, in the above entitled cases, a copy of the last mentioned decision being also enclosed for your information and your files.

The selections are canceled as to the portions described. 031065 is canceled as to the W. ½, N. ½, SE. ¼ and SW. ¼, SE. ¼, sec. 29, T. 23 S., R. 38 E. 031066 is canceled as to the SE. ¼ SE. ¼, sec. 29, N ½, N ½ SW. ¼ and SW. ¼ SW. ¼, sec. 30, T. 23 S., R. 38 E. 031068 is canceled as to the S. ½ SW. ¼, sec. 33, T. 23 S., R. 38 E., while 033371 is canceled as to lots 1 and 2 of sec. 30, T. 14 S., R. 13 E., all of the selections mentioned being closed as to the portions described upon the records of this office. You will make such notations as are necessary upon your records and advise the State hereof by ordinary mail enclosing therewith a copy of the decision dismissing its motion for review.

Very respectfully,

(Signed) C. M. BRUCE,
Assistant Commissioner.

30 EXHIBIT J.

(Copy.)

State Land Office. Robert P. Ervein, Commissioner.

SANTA FE, NEW MEXICO, *December 28, 1916.*

Application for reinstatement.

Roswell 031065, 031068, 031066, and 033371.

The COMMISSIONER OF THE GENERAL LAND OFFICE,
Washington, D. C.

SIR: Referring to your letter "G," J. C. D., of December 14, 1916, involving the above serial numbers in the Roswell, New Mexico, land district, I hereby make application on behalf of the State of New Mexico for reinstatement of the above noted selections as to the lands canceled by the said letter. The ground for such reinstatement is that there is now pending before Congress Senate bill No. 7411, a copy of which is attached hereto, which if passed would validate such selections beyond all doubt. Another ground is that this office will at an early date, take action in a court of competent jurisdiction to compel the Department of the Interior to respect the rights of the State of New Mexico in this and similar cases now pending. Segregation of the lands from entry is requested in the interest of possible applicants who may seek to make entry of the lands in the meantime.

Respectfully,

(Signed) ROBERT P. ERVEIN,
Commissioner of Public Lands for New Mexico.

186

Posted in 94 May 23, 1917. F. H. C.

31 EXHIBIT K.

(Copy.)

DEPARTMENT OF THE INTERIOR,
Washington, October 18, 1917.

D-33272. "G." Roswell 031065.

State's Lieu Selection Cancellation Affirmed. Petition Denied.

STATE OF NEW MEXICO:

Petition for the exercise of supervisory authority.

The department has considered the petition for the exercise of supervisory authority filed on behalf of the State of New Mexico in the above-entitled case, wherein decisions were rendered, on appeal and motion for rehearing, October 14 and November 23, 1916, respectively, directing cancellation of the State's lieu selection 031065

as to the W. ½ and other lands in Sec. 29, T. 23 S., R. 38 E., selected in lieu of lands of equal area in Sec. 36, T. 19 S., R. 14 E., within the then boundaries of the Alamo National Forest.

Briefly stating such facts as are deemed necessary to the proper disposition of the case at bar, it appears that approved plat of survey of T. 19 S., R. 14 E., N. M. P. M., was filed in the local land office June 24, 1885. December 20, 1906, the entire township, embracing the lands offered as base in the particular case under consideration, was withdrawn for the then proposed Sacramento National Forest, and subsequently, by Executive order of April 24, 1907, was included therein, which reservation was later changed to the Alamo National Forest, by Executive proclamation of March 2, 1909.

March 9, 1915, the State filed the selection in controversy. By Executive proclamation of April 3, 1916, prior to approval of the indemnity selection, Sec. 36, T. 19 S., R. 14 E., was excluded from the forest reserve.

Prior adverse action herein was taken upon the ground that the base lands proffered, having been eliminated from the forest reserve prior to approval of the selection, the State retained title to said base lands under its grant as lands in place, and the department was, therefore, without authority of law to approve said selection, following the principle laid down in the case of State of California et al. (44 L. D., 468), wherein it was held:

> Where land within a national forest offered as base for a school indemnity selection is prior to approval of the selection eliminated from the forest the State is not entitled to have the selection consummated but takes title to the base land under the grant.

Among the several contentions urged by counsel for the State in exhaustive briefs filed, as well as upon oral presentation of the case to the department, it is asserted that the ruling cited is without authority of law, contrary to equity and unconscionable; that title to the base and selected lands involved vested in the United States and the State of New Mexico, respectively, upon proffer of the selection "upon the foundation of the principle that a grant in præsenti creates a present obligation upon the part of the grantor and a present interest in the grantee and that the obligation of the grantor is discharged and that the interest intended to be granted vests in the grantee when all the conditions of the grant have been fulfilled;" that by relation, title to the selected lands vests in the State and the base lands in the United States as of date of filing of the selection, and the duty of the department is limited or restricted to the approval of such selection, if regular when filed, regardless of the change in the status of the lands offered as base subsequent to the filing of the selection.

It is further insisted by counsel that the case at bar involves one of exchange, or lands offered in lieu of other lands title to which was in the State at the date the selection was filed, as distinguished from one involving a question of indemnity for a loss of lands within a school section title to which did not pass to the State under its

grant, and that in the former class of cases, the State having waived title to the base lands, or completely parted with title thereto, as an offer on its part to select other lands in lieu thereof, the department is without authority of law to compel the State to reacquire title to such base lands.

The petition also asserts that the State having accepted the offer to surrender lands in place, subsequently included within a reservation, in exchange for other lands, the department is without power, on account of conditions arising subsequent to the tender of the selection, or change in the status of the base lands, to violate the executed contract and withhold approval of the selection without specific authority of Congress.

In the first place, under the laws applicable hereto, sections 2275 and 2276, Revised Statutes, as amended by the act of February 28, 1891 (26 Stat., 796), and the enabling act of June 20, 1910 (36 Stat., 557–565), there remains no doubt but that the State may waive its right to lands in place granted under the acts above cited where, subsequent to acquiring of title by the State, said lands were placed within the forest reservation. The Supreme Court of the United States, in the case of California v. Deseret Water, Oil and Irrigation Company, wherein opinion was rendered March 26, 1917, cited in brief of counsel for petitioner, after quoting the first proviso to the act of February 28, 1891, supra, "Where any State is entitled to said sections sixteen and thirty-six, or where said sections are re-
33 served to any Territory, notwithstanding the same may be mineral land or embraced within a military, Indian, or other reservation, the selection of such lands in lieu thereof by said State or Territory shall be a waiver of its right to said sections," held;

This language, while not as clear as it might be, operates, as we interpret it, to give to the State a right to waive its right to such lands where, as in this case, the same are included in a forest reservation after survey, that is, after the title vests in the State. Unless this proviso refers to lands, the title to which has passed to the State, it adds nothing to the statute and performs no office whatever. This construction preserves the integrity of forest reservations, and permits the State to acquire other lands not surrounded by large tracts in such reservations which are withdrawn from settlement.

The ruling of the Supreme Court of the United States in the case cited is limited merely to the right of the State to waive its interests in the lands offered as base and does not, directly or indirectly, hold that the department, in determining the State's rights under a selection such as the one under consideration, where the base lands have been eliminated from the forest reservation prior to approval of the selection, has no alternative other than to perform the ministerial act of approving such a selection.

The department is clearly of the opinion that the phraseology of the act of February 28, 1891, supra, taken as a whole, and especially that portion of the act providing that "the selection of such lands in lieu thereof by said State or Territory shall be a waiver of

its right to said sections," does not warrant any such construction being placed thereupon as would permit of the term "waiver" of the base lands as being tantamount to the vesting of fee simple title thereto in the United States prior to the department's approval of the selection.

The mere waiver of the base lands, or proffer thereof by the State, does not of itself pass title thereto until accepted by the department by its approval of the selection. The department has long held that approval and certification by the department of the lands selected are a necessary prerequisite to the vesting of title to the selected lands in the State, and it is obviously true as well that title to the base lands tendered in support of such a selection does not vest in the United States until such a selection shall have been approved.

In the case of Hall v. State of Oregon (32 L. D., 565), the department in affirming the action taken by the Commissioner of the General Land Office in rejecting a timber and stone application filed by Hall for lands covered by the indemnity school land selection of the State, held:

It is true, as claimed in the appeal, that until approved by the Secretary of the Interior there is in reality no selection, the proffer of a list and showing in support thereof being only preliminary proceedings taken for that purpose, but in the orderly administration of the land laws this department has uniformly accorded to an indemnity school land, railroad, or other selection made in accordance with an act of Congress, pending its final consideration
34 and disposal by this department, the same segregative effect as an original entry made under the homestead or other public land law.

In the case of State of California et al. (41 L. D., 592), it was held that——

No title is acquired under or by virtue of a school indemnity selection until the same has been approved by the Secretary of the Interior; and where the lands embraced in a selection are classified as oil lands and withdrawn under the provisions of the act of June 25, 1910, the Secretary is without authority to approve the selection in the face of such withdrawal; but it should be rejected, without prejudice to the right of the State to submit showing with a view to securing reclassification of the lands and to apply anew therefor in event of their restoration.

The department, in determining what effect a withdrawal under the act of June 25, 1910 (36 Stat., 847), had upon lands applied for under forest lieu, railroad and State selections, after mature consideration of the question as to whether or not by the mere proffer of a State selection title to the lands sought to be selected thereby unqualifiedly passed to the State or other applicant therefor, as the case might be, laid down the administrative ruling (43 L. D., 293), that——

The acts of Congress authorizing exchanges are merely offers on the part of the United States to exchange other lands for lands held by the selector, and the right of the selector does not attach nor equitable title pass upon the presentation of the requisite papers. There remains the necessity for action upon the offer by the duly authorized officer of the United States. Until that acceptance has been given and the equitable title passed, Congress has full authority to devote the land to a public purpose.

Again, in the case of State of Wyoming (45 L. D., 590), the department citing pertinent decisions by the United States Supreme Court, held that——

Title does not vest in the State under a school indemnity selection until the selection has been duly approved; and a discovery of mineral prior to such approval will defeat the selection.

It is manifest from the rulings cited that it has long and repeatedly been held by this department that there is, in fact, no selection where approval of the department is necessary to give the same validity, until such approval is executed by the department. The department, therefore, cannot concede that the State's contention upon this petition is sound, that the State takes title to the selected lands and the Government title to the base lands upon the mere proffer of selection to the Government prior to its approval by the department.

The contention that by relation titles to the base lands and selected lands pass upon the presentation of a perfected selection is equally without merit. With respect to this feature of the case it may with propriety be stated that the department has invariably adhered to the rule of long standing that a selection, regular on its face when filed, such as the one under consideration, has the same segre-
35 gative effect as a homestead or other entry under the general land laws as against all subsequent claims presented, other than those asserted by the Government, thus withdrawing the land in the meantime from appropriation by later applications so that after the selection shall have been approved the State's rights relate back to the date of filing, and are superior to those asserted subsequent to the filing of the selection and prior to its approval. This only is the extent to which the doctrine of relation has application. (See 27 L. D., 475; 32 L. D., 565; 33 L. D., 161; 34 L. D., 12; 39 L. D., 377.)

The department is fully convinced that title to the selected lands does not vest in the State by the mere proffer of a perfected selection, and the question remaining to be answered is, if title to the selected lands does not pass to the State upon the proffer of a selection, until the selection is approved and certified by the department, does title to the base lands tendered in support of that selection, upon presentation of such a selection, pass from the State to the Government, prior to the acceptance and approval of the selection by the department?

In the case of Edwin Collins (40 L. D., 444) the department, in rejecting a homestead application filed by Collins for lands previously tendered by the State of Idaho as base for school indemnity selection held that—

Lands within a school section assigned by the State as base for indemnity selection is not subject to entry, selection, or other appropriation under the public land laws until the selection is approved and title to the base land revests in the United States.

In the case of Smith v. State of Idaho (40 L. D., 554), the department adhered to the rule as laid down in the case last cited, holding that—

Land within a school section assigned by the State as base for indemnity selection is not subject to appropriation, entry, or selection under the public land laws until the selection is approved and title to the base land becomes vested in the United States.

Again, in the case of John W. Schofield (42 L. D., 538), the department held that—

The legal title to a tract of school land relinquished as base for indemnity selection does not revest in the United States until the selection is approved, and prior to such approval the relinquished land is not subject to entry, selection, or other appropriation under the public land laws; but where settlement was made upon land so relinquished prior to approval of the selection based theron, or the faith of statements by the State land commissioner that the State did not claim the land, and application to enter filed by the settler, such application should not be rejected outright but held and considered in connection with the selection, and if the selection be approved, the settlement right should be recognized and protected.

In the more recent case of State of California et al. (45 L. D., 644), analogous to the case at bar, the department, after distinguishing the case cited from that of Robinson v. Lundrigan (227 U. S., 173), reaffirmed the ruling as laid down in the case of
36 State of California et al. (44 L. D., 468), the legality of which is questioned upon this proceeding, and held that elimination of the base from the forest reserve prior to approval of selection, notwithstanding that the reserve was created subsequent to the date title to the base lands passed to the State under its grant as lands in place, defeated the selection, but that the State would be permitted, if it so elected, to substitute new base in support of the selection.

In passing upon the question as to whether or not title to the base land vests in the Government upon the mere waiver thereof on the part of the State, or upon the tender thereof in support of a selection, it is deemed appropriate here to make mention of the fact that the various States have for years tendered relinquishments of selections pending before the department for approval, and the department has invariably accepted the relinquishments of the selections. Had the proffer of the selection by the State and its waiver of title as to the base lands vested title in the Government, it would require the

issuance of a patent to revest the State with title. (See 27 L. D., 474.)

The department therefore concludes that the State took title to the base lands tendered in support of the selection under its grant, that title thereto was at all times thereafter, prior and subsequent to restoration of said lands from the forest reservation, and is now, in the State of New Mexico, and the very condition, upon which the right of the State to offer said lands in exchange for others is predicated, having been removed by elimination of the base lands from the forest reserve, the department is without authority of law to approve the selection.

The decision rendered by the department in the case of State of California et al. (44 L. D., 468), is accordingly adhered to, without prejudice to the State's right to substitute new base in support of the selection in accordance with the principle laid down in the case of State of California et al. (45 L. D., 644).

The petition must be and is hereby denied.

(Signed) ALEXANDER T. VOGELSANG,
First Assistant Secretary.

Opinion.

Filed September 7, 1918.

* * * * * * *

Hearing on bill and answer.

The bill of complaint in this case is filed by the State of New Mexico against the Secretary of the Interior and the Commissioner of the General Land Office. The relief it seeks is (1) a prayer for process; (2) a preliminary restraining order, restraining and enjoining pendente lite the defendants, etc., from enforcing any or either of certain rulings, holdings, and decisions set out in the bill of complaint or from cancelling or rejecting a certain so-called
37 "lieu selection" described in the bill or from exacting from the plaintiff State a tract of land as base land for such lieu selection other and different from the base land offered by and supporting such selection by the State; (3) that upon a final hearing such restraining order may be made perpetual and that a mandatory injunction may issue against the defendants commanding and requiring each of said rulings to be vacated and set aside and that the right granted and secured to the plaintiff State under a certain granting act set forth in the bill be recognized, respected, and given its full legal force and effect, excluding from any and all consideration in connection with said lieu selection a certain Executive proclamation of April 3, 1916, mentioned in the bill; and (4) prayer for general relief.

Stating the case made out by the bill in its briefest form, it may be said that the plaintiff is seeking by the relief prayed for to secure

to itself what is described in the bill as State lieu selection 031065, Roswell series, being a selection by the State of the west half of section 29 of township 23 south, range 38 east, the same being included in an official plat of survey made by the Federal Government and filed in the local land office of the district wherein the said land is situated in the State of New Mexico, the said plat having been filed as stated March 9, 1915, this selection being in lieu of the north half of section 36 of township 19 south, range 14 east, which at the time of the selection was situated within the exterior boundary lines of what is known as the Alamo National Forest Reserve. The land in lieu of which the said selection was made was a portion of school lands granted by the Federal Government to the then Territory of New Mexico and confirmed to the plaintiff State in the enabling act by which the Territory of New Mexico was admitted as a State of the Union.

The bill of complaint sets forth the various statutes under which it claims the selected land and reference to one or more of them will be made hereafter in this opinion.

The answer of the defendants to the bill of complaint admits all of the material allegations of fact set forth in the bill of complaint save and except the allegation found in the second paragraph of paragraph numbered fifteen of the bill of complaint, which alleges that the lieu selection in question was, among other things, "accompanied with a deed by quitclaim executed by the State land commissioner of the State of New Mexico in accordance with authority given that officer by the act of the Legislature of the State of New Mexico of June 14, 1912, supra, conveying to the United States all the right, title, claim, interest and estate of said State" in and to the land (usually described as base land) in lieu of which the selection claimed by the plaintiff State was made, the denial of the answer in this particular being that they, the defendants, "deny that said selection was accompanied by a deed of quitclaim as averred in said paragraph."

The issue thus made on this allegation of the will has not been urged by counsel for the defendants as material, either in the oral argument or in the briefs that have been filed, these proceeding apparently upon the theory that there are no substantial issues
38 of fact raised by the pleadings and that the suit can be decided on the question or questions of law that are presented by the pleadings and that have been argued by counsel for the respective parties.

The question upon which this suit may, and indeed, in the opinion of the court, should be determined is within a narrow compass. It has been discussed with ability by counsel for the respective parties and, on behalf of the plaintiff, from every aspect that seems rationally conceivable. It may be stated thus: Has the Federal Land Department, including the Commissioner of the General Land Office and the Secretary of the Interior, the power or authority to reject and cancel a so-called "lieu land section" made by a State in sub-

stitution or place of so-called "base" land that had been first withdrawn by the United States Government for forest reserve purposes, and then before final action by the officials mentioned on the selection made by the State in lieu of such base land, had been released or eliminated from such forest reserve?

There is no disputed question of fact to embarrass or to be determined as a preliminary to the determination of the question of law thus presented.

The bill of complaint alleges, after setting forth the performance by the plaintiff of all acts required to be performed by it in making its selection, including the execution and delivery by it to the local register and receiver as the authorized agents of the United States to receive it, of a conveyance of the State's right, title, interest, etc., in the base land to which reference has been made, as follows:

"That in accordance with the rules, regulations, and practice of the Department of the Interior, the said register and receiver duly transmitted said conveyance and said certified lieu selection to the Commissioner of the General Land Office for appropriate consideration and ultimate acceptance by the Secretary of the Interior of such conveyance and the approval by said Secretary to the State of New Mexico of the land it had selected as the consideration for the lands it had reconveyed to the United States."

No question seems to be raised of the power or authority of the President to include the base land within a forest reservation or thereafter to release and eliminate it therefrom, provided that the State's right to make a selection in lieu thereof is not impaired thereby.

It is, however, insisted by the State that when it complied with all requirements of law in the making of a selection, and the same was before the Secretary of the Interior "for appropriate consideration and ultimate acceptance," the release and elimination by the President of the base land from the forest reserve, prior to action by the secretary, could not defeat the selection, or justify its rejection and cancellation, and the Secretary had no function to perform or choice of action save that of approving the selection and thus affording the evidence or muniment of the State's title to the selected land, which, it is contended by the State, vested in it the moment it completed the steps required by the law to be taken by it
39 in the process of making a selection. This contenion, if well founded, leaves to the Secretary no duty to perform except to see that the necessary steps have been taken by the State, and thereupon formally to approve the selection.

The plaintiff State had completely performed all acts required by law of it in the making of a selection by August 23, 1915, and the General Land Office officially apprised of the fact by that date. No action seems to have been taken by the land office on the selection until after the President, some seven months and ten days later, to wit, April 3, 1916, released and eliminated the base land from the forest reservation, and then on May 16, 1916, the defendant

commissioner held the selection for cancellation because of the presidential action which left, according to the commissioner, "the portion of the selection described unsupported by valid base, as no reason is known why the State may not assert title to said base tracts under the provisions of the act quoted." (Act of June 20, 1910, 36 Stat. 562.) On October 14, 1916, the defendant, Secretary of the Interior, affirmed this action of the commissioner, and on November 23, 1916, in a decision denying a motion for a rehearing, adhered to his earlier position, and in doing so cited the decision of the department in the State of California et al., 44 L. D., 468, rendered October 7, 1915, which is directly in point.

As has already been pointed out, the so-called base land upon which the lieu land selection claimed by the plaintiff is founded constituted a part of the school land grants made by the United States to the plaintiff in the days while it was still a Territory, this grant apparently having been made by the act of Congress approved June 21, 1898 (30 Stat. 484–5), this statute making a grant of sections 16 and 36 in every township in the then Territory, now State, of New Mexico. But on December 20, 1906, the particular section 36, a portion of which is the base land referred to, was withdrawn for the proposed Sacramento National Forest, which later was renamed the Alamo National Forest. The right to lieu land selections, so far as the claim of the plaintiff State is concerned, is to be found in sections 2275 and 2276 of the Revised Statutes as amended by act of February 28, 1891 (26 Stat. 796). The material portions of these sections may be here quoted:

Sec. 2275.

* * * * * * *

"other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory where sections sixteen or thirty-six are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States: Provided, Where any State is entitled to said sections sixteen and thirty-six, or where said sections are reserved to any Territory, notwithstanding the same may be mineral land or embraced within a military, Indian, or other reservation, *the selection of such lands in lieu thereof by said State or Territory shall be a waiver of its rights to said sections.*

* * * * * * *

And it shall be the duty of the Secretary of the Interior, without awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservations, and thereupon the State or Territory *shall be entitled to select indemnity lands* to the extent of two sections for each of said townships, in lieu of sections sixteen and thirty-six therein; but such selections may not be made within the boundaries of said reservations; Provided, however, That nothing herein contained shall prevent any State or Territory from awaiting the extinguishment of any such

military, Indian, or other reservation and the restoration of the lands therein embraced to the public domain and then taking the sections sixteen and thirty-six in place therein; but nothing in this proviso shall be construed as conferring any right not now existing."

Sec. 2276. "That the lands appropriated by the preceding section shall be selected from any unappropriated, surveyed public lands, not mineral in character, within the State or Territory where such losses or deficiencies of school sections occur."

(Underscoring by court.)

The right thus given was confirmed to the plaintiff State in the enabling act admitting it to the Union of June 20, 1910 (36 Stat. 557). By section six of this act, there was granted to the State additional sections; that is, additional to sections 16 and 36 in each township, the additions being sections 2 and 32 in said townships, and they were granted, according to the terms of the act, to the State for the support of common schools, and wherever any of these sections or parts thereof were unavailable because they were mineral lands or had been sold, reserved, or otherwise appropriated or reserved by or under authority of any act of Congress, the provisions of section 2275 and 2276 of the Revised Statutes were made applicable thereto

"and to the selection of lands in lieu thereof to the same extent as if sections two and thirty-two, as well as sections sixteen and thirty-six, were mentioned therein: * * * And provided further, That the grants of sections two, sixteen, thirty-two, and thirty-six to said State, within national forests now existing or proclaimed, shall not vest the title to said sections in said State until the part of said national forests embracing any of said sections is restored to the public domain: but said granted sections shall be administered as a part of said forests, and at the close of each fiscal year there shall be paid by the Secretary of the Treasury to the State, as income for its common-school fund, such proportion of the gross proceeds of all the national forests within said State as the area of lands hereby granted to said State for school purposes which are situate within said
41 forest reserves, whether surveyed or unsurveyed, *and for which no indemnity has been selected*, may bear to the total area of all the national forests within said State, the area of said sections when unsurveyed to be determined by the Secretary of the Interior, by protraction or otherwise, the amount necessary for such payments being appropriated and made available annually from any money in the Treasury not otherwise appropriated.

* * * * * * *

"Sec. 10. That it is hereby declared that all lands hereby granted, including those which, having been heretofore granted to said Territory, *are hereby expressly transferred and confirmed to the said State*, shall be by the said State, held in trust, to be disposed of in whole or in part only in manner as herein provided and for the

several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.

"Sec. 11. That all lands granted in quantity *or as indemnity by this act shall be selected, under the direction and subject to the approval of the Secretary of the Interior*, from the surveyed, unreserved, unappropriated, and non-mineral public lands of the United States within the limits of said State, by a commission composed of the governor, surveyor-general, or other officer exercising the functions of a surveyor-general, and the attorney general of the said State."

(Underscoring by court).

From the foregoing extracts, it is to be noted, first, that by section 2275 the right of selection by the State is granted without exception or qualification excepting, as provided in section 2276, that the land that may be selected by the State must be so selected from any unappropriated, surveyed public lands, not mineral in character. At the time of the selection made by the State in this case, the land selected by it was of unappropriated, surveyed public land, not mineral in character, and indeed appears to have been land perfectly free for such selection. It is further to be noted that by section 2275, the selection was made to constitute, in imperative terms, a waiver of the State's right to the section or part thereof in lieu of which the selection was made, the language of the statute being "the selection of such lands in lieu thereof by said State or Territory shall be a waiver of its right to said sections." Contemplating the possibility that some of the townships which included the sections granted to the State for school purposes might be included within Indian, military, or other reservations, the Secretary of the Interior is required by this statute to ascertain and determine by protraction or otherwise the number of such townships without actually awaiting the extension of the public surveys, and that thereupon the State "shall be entitled to select indemnity lands": and by the proviso in said section it is further enacted that nothing contained in the
42 statute shall prevent a State from awaiting the extinguishment of any such reservations and the restoration of the lands therein to the public domain and then taking therefrom the sections originally granted. As has already been pointed out, at the time that the plaintiff State exercised the right given to it by the provision of law from which quotations have been made, the base land was then within a defined forest reservation, and its selection of the land, which at that time was clearly subject to selection by it, constituted a waiver of its right to the base land.

Again, by the provisions of the enabling act that have been quoted, the duty imposed upon the Secretary of the Treasury to pay over to the State as income for its common school fund out of the gross proceeds of the national forests within the State, was conditioned

upon the fact that the State had not selected lieu or indemnity lands for that included within the national forests.

What is the right of selection thus given? That question almost answers itself. Clearly it means a right of unhampered choice within the limitations contained in the legislation, and making that choice the State at the same time waived its right to the base land upon which such selection or choice rested.

It is undoubted that the Secretary of the Interior could prescribe reasonable rules and regulations for the exercise by the State of the right of selection or choice thus given, and it is understood that such rules and regulations were long ago promulgated, and in the instant case faithfully observed by the State. Hence, when the General Land Office had been officially advised by its local register and receiver that the State had complied with all of the rules and regulations referred to and its selection was before the commissioner for action, what power did either he or the Secretary of the Interior have over the selection thus made beyond seeing to it that the rules and regulations governing the exercise of the right of selection had been observed, and that the land so selected was neither mineral nor appropriated for any of the public purposes mentioned in the legislation? Does the law give to either of the defendants the right of arbitrarily rejecting a selection made? Could either of them say to the State, in effect, "I don't like your selection. Make another one, and I will consider it when you have submitted it as required by our rules and regulations"? If so, is there any limit to such power and authority, and what then becomes of the right of selection by the State? Such an interpretation of the law would be, so far as the State is concerned, very much like "keeping the word of promise to the ear and breaking it to the hope."

It is claimed on behalf of the defendants that by section 11 of the enabling act, land selected by the State must be selected "under the direction and subject to the approval of the Secretary of the Interior." Undoubtedly "under the direction" of the Secretary, who had a right to withhold his approval of a selection made if, upon examination, he discovered that it had not been made in accordance with the rules and regulations promulgated by him, or that no sufficient amount of base land was proffered for the selection, or
43 that the land selected was not subject to selection under the limitations of the statutes. But, if it appeared that the rules and regulations had been observed by the selecting State, and that appropriate base land was proffered for the selection, and that the land selected was subject to selection under the statutes, does the language of section 11 give the Secretary the right to say to the State, "I don't like your selection. I won't approve it. You must make another one and when you have made it I will consider that selection. I may not like it, and you will have to make a still further selection." And so on, until by a series of disapprovals the Secretary could coerce the State in an indirect manner to select the land that he desired the State to select and none other. In the opin-

ion of the court no such power and authority was intended to be given to the Secretary by this section. The court is of opinion that, within the limitations that have been enacted, the right of the State in the making of its selection is an unqualified one that cannot be hampered or restricted by the defendants or either of them. Their duty is confined to seeing to it that in making a selection base land of the requisite quantity is proffered; that the land selected is outside of any of the exceptions mentioned in the statute that deny selection to such lands, and that all reasonable rules and regulations promulgated by the Secretary to be followed and observed in the exercise of the right of selection had been so followed and observed, and, these conditions appearing, they had no other power or authority than to approve the selection so made.

The court is further of the opinion that this approval did not in and of itself vest the title to the selected lands in the State. That was accomplished by the selection itself and the approval of the Secretary was but a required record of a fact theretofore accomplished.

All of the conditions required of the State had been fully performed and met by it, the fact officially before the General Land Office and had been for over seven months when by Executive proclamation the base land upon which the selection was founded was eliminated or released from the Alamo National Forest Reservation, and because it was, the defendant commissioner, about something over a month following the proclamation, held that the selection was ineffective because subsequent to its being made the base land ceased to have the character required for the purposes of selection; that is, it had ceased to be within a reservation. And so, if this view is sound, the State now finds itself back where it started. Is it sound? The present very able Secretary of the Interior so holds, affirming the defendant commissioner, and in doing so follows his decision in the State of California case reported in 44 L. D., 468.

The court, however, is unable to concur in the opinions of the defendants in this matter. The court is of opinion that a right is acquired by the State by its selection prior to approval by the proper officer of the United States, and that right cannot be disturbed by a subsequent change in the status of the base land. Its right to the base land upon selection is declared by Congress to be waived. Does this mean anything less than that its right is gone? If gone,
44 what under the law restores it? To hold otherwise would be, it seems to the court, to leave the State at the mercy of executive officials who, acting no doubt from the highest motives, may nevertheless in their proper zeal for the conservation of wise policies with relation to the disposition of the public lands impair or attempt to impair rights that have become vested. And this, the court thinks, would happen to the State in this case, unless it can secure the relief it seeks.

With respect to legislation very similar to that which we have been considering, the forest act of June 4, 1897, the Supreme Court in

the case of Daniels vs. Wagner (237 U. S., 547), in dealing with a claim made on behalf of the Secretary of the Interior to discretionary power in the approval or rejecting of lieu land selections, said (p. 558):

"And it becomes moreover certain that the necessary result of this assertion is the following: That although Congress may have the power to provide for the disposition of the public domain and fix the terms and conditions upon which the people may enjoy the right to purchase, it has not done so, since every command which it has expressed on this subject may be disregarded and every right which it has conferred on the citizen may be taken away by an unlimited and undefined discretion which is vested by law in the administrative officers appointed for the purpose of giving effect to the law. When the true character of the proposition is thus fixed it becomes unnecessary to go further to demonstrate its want of foundation."

The pending case presents no such question as was before the Supreme Sourt in Cosmos Company v. Grey Eagle Company (190 U. S., 301). There the sufficiency of the lieu land selection under consideration in that case had been challenged by the appellee by a protest that had been filed within the time permitted by the regulations of the land office and the questions arising thereunder were at the time of filing of the bill in that case still pending undisposed of before the General Land Office; and the court held that the question thus raised being still properly before the department the courts could not take jurisdiction and proceed to decide such questions themselves. But the court also reiterated the established rule that the courts will not be bound by the decision of the Land Department upon questions of law, it declaring in the course of its opinion, at page 314, that "Its (Land Department) decision on any legal question would not, of course, be binding on the courts whenever such a question may properly arise in any future legislation."

The contentions made on behalf of the defendants proceed apparently upon the theory that when the State came to exercise its right of lieu land selection, the selection so made and submitted to the Land Department constitutes an offer of the State to exchange base land for the lieu land. It does not seem to the court that this is sound, if for no other reason than that it destroys at the threshold the character of the selection or choice which, as has already been stated, is, in the opinion of this court, what Congress intended to give to the State under the circumstances presented. In a
45 sense, of course, there is an offer; that is, the State presents its selection to the Secretary for approval, the approval, however, involving the consideration of such matters as have heretofore been set out in this opinion. Certainly when approval is given to a selection the title of the State to the land selected relates back to the time when the selection was made by the State. So the Supreme Court holds in the case of Weyerhaeuser v. Hoyt (219 U. S., 380), in dealing with lieu land selections under a railroad land grant. The fol-

lowing language is taken from the syllabus of that case and seems to be borne out by the text of the opinion:

"The power of the Secretary to approve selections is judicial in its nature, and implies the duty to determine as of the time of filing the selection, and the doctrine of relation applies to decisions as to the validity of such selections."

If the quoted language is to be given its plain import it is to be at once seen by the facts in the pending case that at the time of the filing by the State of its selection its validity was not subject to question.

Without, therefore, intending in any manner to question the right and the power of the Secretary to approve selections made under the circumstances and law applicable to the present case, the court is of opinion that approval cannot be withheld if it shall appear that the land selected was free for that purpose. It is to be observed that we are here dealing with the legislation enacted in the interest of the plaintiff State, together with such other general legislation as has been noted as also applicable, and in the final analysis the court holds that the presidential proclamation eliminating or releasing the base land in this case from the Alamo National Forest subsequent to the complete and perfected selection by the State of lieu lands could not operate to destroy the character as base land for the purposes of such selection, it being good base land for this object at the time of the selection, and the selection itself constituting, as has been pointed out, a waiver of the State's right to the base land; and the selection in all respects being perfect and unobjectionable, the right of the State is to be determined as of the time of completing or perfecting its selection.

In view of the foregoing, a decree granting the relief prayed will be signed upon presentation and notice.

F. L. Simms, *Justice.*

September 7th, 1918.

Decree.

Filed September 25, 1918.

* * * * * * *

This cause came on to be heard on bill and answer and was argued by counsel. After consideration thereof it is by the court this 25th day of September, 1918,

Ordered and decreed, That the defendants, Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, and all persons claiming to act under the authority, direction, or control of either of them, be, and they hereby are, permanently restrained and enjoined from enforcing any or either of the rulings, holdings, and decisions made and rendered by them in furtherance of their purpose of effectuating, with respect to that certain selection and appropriation of the west half of section twenty-nine of township twenty-three south, in range thirty-eight east, of the New Mexico principal meridian [illegible]

of New Mexico in lieu of the north half of section thirty-six of township nineteen south, in range fourteen east, of the same meridian and in the same State, which selection was made by the State of New Mexico under the grant to it by Congress of public lands of the United States for the support of common schools and is more fully described in the bill of complaint filed herein, that rule of decision announced by First Assistant Secretary of the Interior Andrieus A. Jones on October 7, 1915, in the proceeding in the Department of the Interior entitled as State of California et al., such rule and decision being reported in the forty-fourth volume of the Decisions of the Department of the Interior relating to public lands, at page four hundred and sixty-eight thereof; and it is further

Ordered and decreed, That the said defendants, and each of them, and their successors in office, and all persons claiming to act under the authority, direction, and control of either of them, be, and they hereby are, commanded and required to recognize, respect, and give full legal force and effect to that certain selection and appropriation which is mentioned in the preceding paragraph of this order and decree, and to do so in the due exercise of lawful judgment and discretion without imputing to a certain Executive proclamation of April 3, 1916 (39 United States Statutes at Large, part two, at pages 1774, 1775), eliminating the said north half of section thirty-six of township nineteen south, in range fourteen east, of the said meridian and in the State of New Mexico from the Alamo National Forest any effect whatsoever upon such selection and appropriation.

By the court:

F. L. Siddons, *Justice.*

Whereupon the defendants, by their attorney, in open court noted an appeal from the aforegoing decree to the Court of Appeals of the District of Columbia; and it is hereby, on the day aforesaid,

Ordered, That the appeal be allowed and that execution of said decree be, and the same hereby is, stayed pending said appeal.

By the court:

F. L. Siddons, *Justice.*

No objection as to form.

C. E. Wright, *Atty. for Defts.*

47 *Assignment of errors.*

Filed October 2, 1918.

* * * * * * *

The appellants assign the following errors in the decision and decree of court in the above entitled suit:

1. The court erred in not dismissing the bill of complaint;

2. The court erred in not holding and deciding that the act of the defendants sought to be enjoined involved the exercise of judgment and discretion on the part of the defendants in a matter exclusively within their jurisdiction to decide and determine and, as such, is not subject to review by a court in any direct proceeding;

3. The court erred in entering a decree, save of dismissal, in this cause in the absence of the United States as a necessary party to the suit.

4. The court erred in holding and deciding that the mere act of a State in selecting lieu lands under the act of February 28, 1891 (26 Stat., 796), amendatory of sections 2275 and 2276 of the Revised Statutes, vests title in the State to the selected land.

5. The court erred in holding and deciding that the presidential proclamation eliminating the State's base land from the national forest did not have the effect of destroying its character as base land within the meaning of the acts of Congress under which the plaintiff sought an exchange of lands.

6. The court erred in decreeing and ordering the defendants to readjudicate the plaintiff's application to select land by substituting the judgment and ruling of the court for the judgment of the defendants in a matter confided by law exclusively to them to decide and determine.

7. The court erred in granting the injunction sought in plaintiff's bill.

CHARLES D. MAHAFFIE,
Solicitor.
C. EDWARD WRIGHT,
Assistant Attorney.

Designation of record.

Filed October 2, 1918.

* * * * * * *

In preparing transcript of the record on the appeal of the defendants in the above entitled suit, the clerk of the court will please to include therein the following:

1. The bill of complaint.
2. The answer of the defendants and the exhibits.
3. The opinion of the court.
48 4. The decree and notation of appeal and stay of execution.
5. The assignment of errors.
6. This designation.

C. EDWARD WRIGHT,
Attorney for Defendants.

Service acknowledged this 1st day of October, 1918.
PATRICK H. LOUGHRAN,
Attorney for Plaintiff.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 72, both inclusive, to be a true and correct transcript of the record,

according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 35624 in equity, wherein State of New Mexico is plaintiff and Franklin K. Lane, Secretary of the Interior, et al. are defendants, as the same remains upon the files and of record in said court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 6th day of November, 1918.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 3221. Franklin K. Lane, Secretary of the Interior, et al., appellants, vs. State of New Mexico. Court of Appeals, District of Columbia. Filed Nov. 6, 1918. Henry W. Hodges, clerk.

49 TUESDAY, *May 6th, A. D. 1919.*

FRANKLIN K. LANE, SECRETARY OF the Interior, et al., Appellants,
vs.
STATE OF NEW MEXICO.
No. 3221. April term, 1919.

It is stipulated that the above entitled cause may be heard and determined by the Chief Justice and Mr. Justice Robb, in the absence of Mr. Justice Van Orsdel.

C. EDWARD WRIGHT,
Counsel for Appellant.
PATRICK H. LOUGHRAN,
Counsel for Appellee.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, AND Clay Tallman, Commissioner of the General Land Office, Appellants,
vs.
STATE OF NEW MEXICO.
No. 3221.

The argument in the above entitled cause was commenced by Mr. C. E. Wright, attorney for the appellants, and was concluded by Mr. P. H. Loughran, attorney for the appellee. On motion, the appellant is allowed to file additional authorities herein.

50 In the Court of Appeals of the District of Columbia.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, AND Clay Tallman, Commissioner of the General Land Office, Appellants,
vs.
STATE OF NEW MEXICO.
No. 3221

Opinion.

Mr. Justice ROBB delivered the opinion of the court:

Appeal from a decree in the Supreme Court of the District, after hearing on a bill and answer, enjoining appellants from enforcing a decision holding for cancellation a lieu land selection of the State of New Mexico, the ground of that decision being that, subsequent to such selection but prior to final action thereon by the Interior Department, the base land again had been made available for school purposes by a change in the boundaries of the Alamo National Forest.

The north half of section 36 was granted to the State of New Mexico for school purposes (30 Stat., 484, 485; 36 Stat., 557), and is conceded that the State's title thereto was absolute. Subsequently the Alamo National Forest was created, which surrounded the above grant. By section 6 of the act of June 20, 1910 (36 Stat., 557), the provisions of sections 2275 and 2276, R. S., as amended by the act of February 28, 1891 (26 Stat., 796), were extended to New Mexico. Section 2275 provides for lieu land selections and declares that such selections shall be a waiver of the right of the State to the base lands. Section 2276 provides that the lands appropriated by section 2275 "shall be selected from any unappropriated, surveyed public lands, not mineral in character," and section 11 of the act of 1910 provides "that all lands granted in quantity or as indemnity by this act shall be selected under the direction and subject to the approval of the Secretary of the Interior, from the surveyed, unreserved, unappropriated, and nonmineral public lands of the United States within the limits of said State," etc.

51 It is conceded that, as the title to the base land was in New Mexico when the Alamo National Forest was created, the State had a right to exchange this land for other land in lieu thereof; and, further, that the land embraced in this lieu land selection was "surveyed, unreserved, unappropriated, and nonmineral" public land. In other words, the sole contention of the department is that the boundaries of the national forest having been changed subsequent to the filing of the lieu land selection, so that the base land in question was not embraced therein, the statutory basis for the exchange had ceased to exist.

In California vs. Deseret Water, &c., Co. (243 U. S., 415), it was ruled that when a forest reserve is made to include a school section previously surveyed, as in this case, the State may waive its right to the section and select other land in lieu thereof, under sections 2275

and 2276, R. S., as amended. Under the authority of that case, the filing by the State of New Mexico in the present case of the lieu land selection constituted a waiver of the State's title to the base land, and the equitable title from that moment was in the United States. The statute explicitly provides that the filing of such a selection "shall be a waiver" of the right of the State to the base land.

We regard the case as ruled by our decision in Central P. R. Co. vs. Lane (46 App. D. C., 374), where it was held that the Interior Department was without authority to reject an indemnity selection filed by the railroad company because the land, subsequent to the filing of such selection, had been included in a water-power reserve site. In the present case, New Mexico having waived its right to the base land and filed on other land open to selection, the rights of the parties became fixed and the Interior Department was clothed with no authority to withhold its approval because of conditions which one of the parties to the contract subsequently created. It is unnecessary to repeat what was said in the Central P. R. Co. case.

The decree is affirmed, with costs.

Affirmed.

52 MONDAY, *June 2nd, A. D. 1919.*

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, and Clay Tallman, Commissioner of the General Land Office, Appellants, *vs.* STATE OF NEW MEXICO.	No. 3221. April term, 1919.

Appeal from the Supreme Court of the District of Columbia. This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered, adjudged and decreed by this court that the decree of the said Supreme Court in this cause be and the same is hereby affirmed with costs.

Per Mr. JUSTICE ROBB,
June 2, 1919.

Mr. Justice Van Orsdel did not sit or take part in this decision.

53 In the Court of Appeals of the District of Columbia.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, AND Clay Tallman, Commissioner of the General Land Office, Appellants, *vs.* STATE OF NEW MEXICO.	No. 3221.

Petition for allowance of appeal.

Come now the appellants in the above-entitled cause, by their attorneys, and show that on or about the 2nd day of June, 1919, this court entered a decree herein in favor of the appellee and against

the appellants, affirming a decree of the Supreme Court of the District of Columbia in favor of said appellee, in which decree of said Court of Appeals certain errors were committed to the prejudice of the appellants, all of which will appear more in detail from the assignment of errors filed with this petition.

The appellants further show that the said decree of this court is subject to review by the Supreme Court of the United States under the provisions of the first paragraph of section 250 of the Judicial Code, in that that jurisdiction of the trial court is in issue.

They further show that said decree is subject to review by the Supreme Court of the United States under the provisions of the fifth paragraph of said section 250, in that the validity of an authority exercised under the United States and the existence and scope of a power or duty of the appellants, said appellants being officers of the United States, are drawn in question.

They further show that said decree is subject to review by the Supreme Court of the United States under the provisions of the sixth paragraph of said section 250, in that the proper con-
54 struction of the acts of Congress under which appellee claims is drawn in question by the appellants, who were defendants below.

Wherefore, they pray the allowance of an appeal removing this case to the Supreme Court of the United States for the correction of errors complained of; and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States; renewing herein and hereby their motion hereinbefore filed, if the same has not already been allowed, that the mandate of this court be stayed until further order.

FRANKLIN K. LANE,
Secretary of the Interior.

CLAY TALLMAN,
Commissioner of the General Land Office.

By their attorneys:

CHARLES D. MAHAFFIE,
Solicitor.

C. EDWARD WRIGHT,
Assistant Attorney.

55 In the Court of Appeals of the District of Columbia.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, AND Clay Tallman, Commissioner of the General Land Office, Appellants,
vs.
STATE OF NEW MEXICO.
No. 3221.

Assignment of Errors.

Come now the appellants, by their attorneys, and say that in the record and proceedings of the Court of Appeals in the above-entitled

cause, and in the rendition of final decree therein, manifest error has intervened to the prejudice of said appellants, in this, to wit:

1. That the court erred in affirming the decree of the Supreme Court of the District of Columbia and in not reversing the same.

2. That the court erred in holding that the filing of a selection list by the appellee operated as a waiver of its title to the base land, as a conveyance of the equitable title therein to the United States, and as securing to said appellee a vested right or interest in and to the selected land.

3. That the court erred in not holding that until a State's selection list is approved by the Secretary of the Interior, as provided by law, no property rights in lieu lands, as against the United States, becomes vested in the State.

4. That the court erred in not holding, where land to which the State has complete legal title is offered as base because it falls within the outboundaries of a natural forest created subsequently to the State's acquirement of full legal title, and where, prior to approval by the Secretary of the Interior, the exterior lines of such natural forest are changed so that said base land is no longer within said
56 outboundaries, that the Secretary of the Interior is without authority of law to proceed to effect an exchange under the provisions of sections 2275 and 2276, Revised Statutes, as amended by the act of February 28, 1891 (26 Stat., 796).

5. That the court erred in taking jurisdiction to review directly the decision of the Secretary of the Interior in a matter committed by law exclusively to his jurisdiction and involving the exercise of his judgment and discretion, and in ordering the substitution therefor of the court's judgment and opinion.

6. That the court erred in not holding that the United States is a necessary party to this suit.

Wherefore, the appellants pray that for the errors aforesaid and other errors appearing in the record of said Court of Appeals, the said decree of said Court of Appeals may be reversed, annulled, and for naught esteemed, and that said cause be remanded to the said court with instructions to reverse the decree of the Supreme Court of the District of Columbia and to enter a decree dismissing the bill herein filed, or for such further proceedings in said suit as may be determined by the Supreme Court of the United States, to the end that justice may be done in the premises.

By their attorneys:

FRANKLIN K. LANE,
Secretary of the Interior.
CLAY TALLMAN,
Commissioner of the General Land Office.
CHARLES D. MAHAFFIE,
Solicitor.
C. EDWARD WRIGHT,
Assistant Attorney.

(Endorsed:) No. 3221. Franklin K. Lane, Secretary of the Interior, et al., vs. State of New Mexico. Petition for allowance of appeal and assignment of errors. Court of Appeals, District of Columbia. Filed Jun. 2, 1919. Henry W. Hodges, clerk.

57 WEDNESDAY, *June 4th, A. D., 1919.*

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, and Clay Tallman, Commissioner of the General Land Office, Appellants,
vs.
STATE OF NEW MEXICO. } No. 3221.

On consideration of the petition for the allowance of an appeal to the Supreme Court of the United States in the above entitled cause, it is by the court this day ordered that said petition be and the same is hereby granted.

58 UNITED STATES OF AMERICA, *ss:*

To State of New Mexico, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United State, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the appellants, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Hon. Constantine J. Smyth, chief justice of the Court of Appeals of the District of Columbia, this 6th day of June, in the year of our Lord one thousand nine hundred and nineteen.

CONSTANTINE J. SMYTH,
Chief Justice of the Court of Appeals of the District of Columbia.

Service acknowledged June 6, 1919.
PATRICK H. LAUGHRAM,
Counsel for Appellee.

59 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 58, inclusive, constitute a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Franklin K. Lane, Secretary of the Interior,

and Clay Tallman, Commissioner of the General Land Office, Appellants, *v.* State of New Mexico, No. 3221, April term, 1919, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 6th day of June, A. D. 1919.

[SEAL.]
Form C. A. S.

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

60 (Indorsed on cover.) File No. 27167. District of Columbia.

Court of Appeals. Term No. 412. Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, Appellants, *v.* The State of New Mexico. Filed June 11th, 1919. File No. 27167.